

# Prejudgment Remedies: A Need for Rationalization

Eric Gertner

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# PREJUDGMENT REMEDIES: A NEED FOR RATIONALIZATION

By ERIC GERTNER\*

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\* Legal Research Officer, Ontario Law Reform Commission, and Part-time Instructor, Osgoode Hall Law School, York University. The opinions expressed are Mr. Gertner's and in no way represent the views of the Ontario Law Reform Commission. Mr. Gertner would like to thank Professor W.A. Bogart, Faculty of Law, University of Windsor, Professor J.B. Laskin, Faculty of Law, University of Toronto and M.A. Springman, Legal Research Officer, Ontario Law Reform Commission, for their helpful suggestions with respect to an earlier draft of this paper.

## I. INTRODUCTION

In this article, some recent developments in the law relating to prejudgment relief will be traced. The focus of the discussion will be certain proposals of the Civil Procedure Revision Committee<sup>1</sup> and the rise and the development of the *Mareva*<sup>2</sup> injunction. Although creditors in Ontario may also obtain prejudgment relief under such statutes as the *Absconding Debtors Act*,<sup>3</sup> the *Small Claims Courts Act*<sup>4</sup> and the *Fraudulent Debtors Arrest Act*,<sup>5</sup> this legislation will not be discussed in this paper. This legislation is recognized to be of limited utility to the creditor who is concerned about the activities of his debtor before judgment. Additionally these statutes, which have remained unchanged for a century, are under review by the Ontario Law Reform Commission (OLRC) at the present time.<sup>6</sup> An appraisal of the Commission's recommendations in this regard must await the publication of Part IV of the *Report on the Enforcement of Judgment Debts and Related Matters*.<sup>7</sup>

The Civil Procedure Revision Committee was established in 1975 under the auspices of the Ministry of the Attorney General, Province of Ontario.<sup>8</sup> Its terms of reference were as follows:

- (1) A thorough re-examination of the principles and policies upon which the Rules of Practice are based and an evaluation of individual rules with a view to:
  - (a) simplifying as much as possible, the procedure in civil actions concentrating on the use of simple language and terminology;
  - (b) decreasing the number of rules;
  - (c) balancing the expense to litigants of the prescribed procedures against convenience, efficiency and social purpose;
  - (d) consideration of alternative, more expeditious and less formal adjudicative procedures; and
  - (e) developing innovative measures to ensure that the procedure in civil litigation is understandable by members of the public, the steps necessary to finalize a dispute are minimal and the cost of such procedure is reasonable.
- (2) In conjunction with the review of the Rules of Practice, a complete examination of The Judicature Act and other statutes affected by proposed changes in the rules.
- (3) Consideration of the nature and function of the Rules Committee under The

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<sup>1</sup> See Ont., *Civil Procedure Revision Committee* (Toronto: Min. of A.G., 1980) [hereinafter *Report*].

<sup>2</sup> See *Mareva Compania Naviera SA v. Int'l Bulkcarriers SA* (*The Mareva*), [1980] 1 All E.R. 213, [1975] 2 Lloyd's Rep. 509 (C.A.).

<sup>3</sup> R.S.O. 1980, c. 2.

<sup>4</sup> R.S.O. 1980, c. 476, ss. 159-73, the absconding debtors provisions of the *Small Claims Courts Act*.

<sup>5</sup> R.S.O. 1980, c. 177.

<sup>6</sup> See O.L.R.C., *Fourteenth Annual Report 1980-81* (Toronto, 1981).

<sup>7</sup> O.L.R.C., *Report on the Enforcement of Judgment Debts and Related Matters* (Toronto: Min. of A.G., 1981). Parts I-III of this report were published in 1981.

<sup>8</sup> For a history of the Committee, see Williston, *Revising the Ontario Rules of Practice—The Work of the Civil Procedure Revision Committee* (1977-78), 1 Adv. Q. 18.

Judicature Act to determine an appropriate method for continuous review of the rules subsequent to the current proposed revision.<sup>9</sup>

In June 1980, the Committee issued its Report<sup>10</sup> containing a proposed revision of the *Judicature Act*<sup>11</sup> and proposed Rules of Civil Procedure.<sup>12</sup> Among the matters considered by the Committee were five important prejudgment remedies, each of which is discussed briefly in Part II of this paper.

Shortly after the creation of the Civil Procedure Revision Committee, the English courts recognized the need for a prejudgment remedy to prevent a debtor from removing his assets from England pending the final determination of proceedings commenced against the debtor by his creditor.<sup>13</sup> Despite long standing authority to the contrary,<sup>14</sup> the English Court of Appeal, in a series of decisions in 1975,<sup>15</sup> concluded that, before he has secured a judgment against his debtor, a creditor should be able to enjoin him in certain circumstances from dealing with his assets to the creditor's detriment. The rise and development of this type of an injunction, known as a *Mareva* injunction,<sup>16</sup> will be examined in Part III of this paper. In Part IV, attention will be focused on recent judicial pronouncements respecting the *Mareva* injunction in Canada, Australia and New Zealand.

The final section of this paper will contrast briefly the approach taken by the Civil Procedure Revision Committee in respect of the five prejudgment remedies considered in Part II and the judicial creation of the *Mareva* injunction. Of particular interest is the fact that the *Mareva* injunction developments span the period during which the Civil Procedure Revision Committee deliberated the changes to be made to Ontario's present *Judicature Act* and the existing Supreme Court of Ontario Rules of Practice.

<sup>9</sup> Report, *supra* note 1, s. 1, at 2.

<sup>10</sup> *Supra* note 1.

<sup>11</sup> *Id.*, s. 5. The proposed Act would replace the existing *Judicature Act*, R.S.O. 1980, c. 223.

<sup>12</sup> *Id.*, s. 6. The Rules of Civil Procedure would take the place of the present Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540.

<sup>13</sup> The first case in which an English court granted such relief was *Nippon Yusen Kaisha v. Karageorgis*, [1975] 1 W.L.R. 1093, [1975] 3 All E.R. 282, [1975] 2 Lloyd's Rep. 137 (C.A.). For a discussion of this case, see discussion in Part II, section A, *infra*.

<sup>14</sup> See e.g., *Lister & Co. v. Stubbs* (1890), 45 Ch. D. 1, 63 L.R. 75, 38 W.R. 548 (C.A.).

<sup>15</sup> See discussion in Part II, s. A, *infra*.

<sup>16</sup> The name is taken from the second of a trilogy of cases in which the English Court of Appeal sanctioned the granting of such relief: see *The Mareva*, *supra* note 2. See also Powles, *The Mareva Injunction*, [1978] J. of Bus. L. 11; Christie, *The Mareva Injunction: Preserving the Fruits of Success* (1980), 1 B.L.R. 155; Grant, *The Mareva Injunction Four Years On* (1980), 130 New L.J. 985; Jones, "The Rise of the 'Mareva' Injunction," in *Cambridge Lectures*, Mendes da Costa, ed. (Toronto: Butterworths, 1981) 30; Jones, *The Rise of the Mareva Injunction* (1980), 11 U. Queensland L.J. 133; Cato, *The Mareva Injunction and its Application in New Zealand*, [1980] N.Z. L.J. 270; Stockwood, *'Mareva' Injunctions* (1981), 3 Adv. Q. 85; Rose, *The Mareva Injunction—attachment in personam—Part 1*, [1981] L.M.C.L.Q. 1; Rose, *The Mareva Injunction—attachment in personam—Part 2*, [1981] L.M.C.L.Q. 177.

## II. THE CIVIL PROCEDURE REVISION COMMITTEE AND PREJUDGMENT RELIEF

In this Part of the paper, it is proposed to examine the treatment accorded prejudgment relief in the *Judicature Act*<sup>17</sup> and Rules of Civil Procedure<sup>18</sup> advocated by the Civil Procedure Revision Committee. The focus will be on the following prejudgment remedies: a certificate of pending litigation; an order for the preservation of property; an order for the interim recovery of personal property; an order for the setting aside of a default judgment upon terms; and an order for security for costs. Discussion of the use of an interlocutory injunction restraining a debtor from disposing of, or transferring, any of his assets will be reserved until the final section of this paper.

### A. Certificate of Pending Litigation

Section 50 of the proposed *Judicature Act* would replace sections 41 and 42 of the present *Judicature Act*.<sup>19</sup> For purposes of convenience, sections 41 and 42 of the present Act, and section 50 of the recommended replacement legislation, are set out in full. Sections 41 and 42 read as follows:

41.-(1) The institution of an action or the taking of a proceeding in which any title to or interest in land is brought in question shall not be deemed notice of the action or proceeding to any person not a party to it until, where the land is registered under *The Land Titles Act*, a caution is registered under that Act, or in other cases, until a certificate, signed by the proper officer of the court, has been registered in the registry office of the registry division in which the land is situate.

(2) The certificate may be in the following form:

I Certify that in an action or proceeding in the Supreme Court of Ontario between *A.B.*, of ..... and *C.D.*, of ..... some title or interest is called in question in the following land: (describing it).

Date at (stating place and date)

(3) Subsection 1 does not apply to an action or proceeding for foreclosure or sale upon a registered mortgage or to enforce a lien under *The Mechanics' Lien Act*.

(4) Any person who registers a certificate or caution referred to in subsection 1 without a reasonable claim to title to or interest in the land is liable for any damages sustained by any person as a result of its registration.

(5) The liability for damages under subsection 4 and the amount thereof may be determined in an action commenced therefor in the court in which the certificate is issued or by application in the proceeding for an order to vacate the caution or certificate or in the action or proceeding in which the question of title to or interest in the land is determined.

42.-(1) Where a caution or certificate has been registered and the plaintiff or other party at whose instance it was issued does not in good faith prosecute the action or proceeding, a judge of the court in which the action or proceeding was commenced may at any time make an order vacating the caution or certificate.

(2) Where a caution or certificate has been registered and the plaintiff's claim is not solely to recover land or an estate or interest in land but to recover

<sup>17</sup> Report, *supra* note 1, s. 5.

<sup>18</sup> The proposed Rules of Civil Procedure would constitute schedule "A" of the proposed *Judicature Act*: see *id.*, s. 6.

<sup>19</sup> R.S.O. 1980, c. 223, as am.

money or money's worth, chargeable on or payable out of land, or some estate or interest in it, or for the payment of which he claims that the land or such estate or interest ought to be subjected, or where the plaintiff claims land or some estate or interest in land, and, in the alternative, damages or compensation in money or money's worth, a judge of the court in which the action or proceeding was commenced may at any time make an order vacating the caution or certificate upon such terms as to giving security or otherwise as is considered just.

(3) A judge of the court in which the action or proceeding was commenced may at any time vacate the registration upon any other ground that is considered just.

(4) On an application under this section, the judge may order any of the parties to it to pay the costs of any of the other parties to it, or may make any other order with respect to costs that under all the circumstances is considered just.

(5) The order vacating a caution or certificate is subject to appeal according to the practice in like cases and may be registered in the same manner as a judgment affecting land, except that the judge granting the order may order a stay of the registration for the purposes of the appeal.

(6) Where a caution or certificate is vacated, any person may deal in respect to the land as fully as if the caution or certificate had not been registered, and it is not incumbent on any purchaser or mortgagee to inquire as to the allegations in the action or proceeding, and his rights are not affected by his being aware of such allegations.

(7) The jurisdiction of a judge of the High Court under this section and section 41 may be exercised by a local judge of the High Court.

#### Section 50 of the proposed Act states:

50.-(1) The commencement of a proceeding in which any title to or interest in land is brought in question shall not be deemed notice of the proceeding to any person not a party to it until, where the land is registered under *The Land Titles Act*, a caution is registered under that Act, or in other cases, until a certificate, signed by the registrar of the court, has been registered in the registry office of the registry division in which the land is situate.

(2) The certificate may be in the following form:

*I certify that in a proceeding in the ..... Court of .....  
between A.B., of ..... and C.D., of ..... some title or  
interest is called in question in the following land: (describing it).  
Dated at ..... this ..... day of ....., 19.....*

(3) Subsection (1) does not apply to an action or proceeding for foreclosure or sale upon a registered mortgage or charge, or to enforce a lien under *The Mechanics' Lien Act*.

(4) Any party who registers a certificate or caution referred to in subsection (1) without a reasonable claim to title to or interest in the land is liable for any damages sustained by any person as a result of its registration.

(5) The liability for damages under subsection (4) and the amount thereof may be claimed in the same proceeding or in a separate proceeding.

(6) Where a caution or certificate has been registered and the plaintiff or applicant, at whose instance it was issued, does not in good faith prosecute the proceeding, the court in which the proceeding was commenced may at any time make an order vacating the caution or certificate.

(7) Where a caution or certificate has been registered and the claim of the plaintiff or applicant is not solely to recover any title to or interest in land but to recover money chargeable on or payable out of land, or some interest in it, or for the payment of which he claims that the land or such interest ought to be subjected, or where the plaintiff or applicant claims any title to or interest in land, and in the alternative, damages or compensation in money, the court in which the proceeding was commenced may at any time make an order vacating the caution or certificate upon such terms as to giving security or otherwise as may seem just.

(8) The court in which the proceeding was commenced may at any time vacate the registration upon such other ground as may seem just.

(9) On a motion under this section, the court may order any of the parties

to the proceeding to pay the costs of any of the other parties thereto, or may make any other order with respect to costs that under all the circumstances may seem just.

(10) The order vacating a caution or certificate is subject to appeal, and the order may be registered in the same manner as a judgment affecting land, but the court granting the order may order a stay of the registration pending the disposition of the appeal.

(11) Where a caution or certificate is vacated, and the order vacating it has been registered, any person may deal in respect to the land as fully as if the caution or certificate had not been registered, and it is not incumbent on any purchaser or mortgagee to inquire as to the allegations in the proceeding, and his rights are not affected by his being aware of such allegations.

Essentially, the differences between the provisions to obtain a *lis pendens* under the present *Judicature Act* and the equivalent section under the new legislation are minimal. A certificate of pending litigation, like a *lis pendens*, may be obtained only where the suit brings into question "any title to or interest in land." Presumably, then, the existing jurisprudence regarding what constitutes a "title to or interest in land" will be applicable to section 50 of the new Act.<sup>20</sup> The language of section 50(4) of the proposed Act puts beyond doubt the freedom from liability of a party's lawyer for registering a "certificate or caution . . . without a reasonable claim to or interest in the land." Section 41(4) of the present Act refers to the liability of "[a]ny person," whereas section 50(4) of the proposed *Judicature Act* is stated in terms of "any party." In this respect, the change in terminology seems to be simply a codification of the case law, albeit sparse, in respect of section 41(4).<sup>21</sup>

Another notable amendment to section 41 of the present *Judicature Act*, proposed by the Committee, concerns the procedure for asserting a claim for damages for the registration of a certificate or caution without a reasonable claim to title to or interest in the land. While section 41(5) of the present Act enables such a claim to be asserted in three different ways, section 50(5) of the proposed Act would require a claim to be asserted "in the same proceeding or in a separate proceeding." In other words, under the new Act liability could not be determined "by application in the proceeding for an order to vacate the caution or certificate," a procedure permitted under section 41(5) of the existing legislation.

Under the proposed *Judicature Act*, the issuing and the vacating of a caution or certificate of pending litigation are outlined in the same provision, section 50. The vacating of a *lis pendens* under the present *Judicature Act*,

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<sup>20</sup> For a discussion of this point, see Williston and Rolls, 2 *The Law of Civil Procedure* 2 Vols. (Toronto: Butterworths, 1970) at 599-607. For a collection of the relevant cases, see 1 *Holmsted and Gale on the Judicature Act of Ontario and Rules of Practice (Annotated)* (Toronto: Carswell, 1980) at 443-50 (Rel. 15, Oct. 1980). See also Rolls, *Civil Procedure*, [1967] L.S.U.C. Special Lectures 77 at 90; Collins-Williams, *The Recovery of Land*, [1961] L.S.U.C. Special Lectures 29 at 46-53.

<sup>21</sup> See e.g., *McIntyre v. Commerce Capital Mortgage Corp.* (1980), 28 O.R. (2d) 353, 110 D.L.R. (3d) 421 (H.C.). Section 41(4) was introduced in response to a number of decisions in which it was held that a *lis pendens* cannot be treated as a slander of title: See e.g., *Greenwood v. Magee* (1977), 15 O.R. (2d) 685, 4 C.P.C. 67 (H.C.).

on the other hand, is the exclusive concern of section 42. The provisions of section 42 have been repeated, however, with some minor changes in language in the proposed section 50.

The procedure to be followed to obtain a certificate of pending litigation is dealt with in Rule 42 of the proposed Rules of Civil Procedure: "Where a claim for a certificate . . . together with a description, sufficient for registration, of the lands in question, has been included in the originating process, a motion for leave to issue a certificate of pending litigation may be made without notice."<sup>22</sup> Notice of the motion for leave to issue such a certificate must be given if the originating process is silent regarding a claim for a certificate of pending litigation.<sup>23</sup> Rule 32 of the existing Rules of Practice, on the other hand, contains no procedure to obtain a *lis pendens* where it is not claimed in the endorsement on the writ of summons. Presumably, the plaintiff would be required to amend the endorsement on his writ of summons to include a claim for a *lis pendens* before a court could grant this prejudgment relief. Assuming that the writ of summons contains a claim, in the appropriate form, for a *lis pendens*, Rule 32(2) provides that a "certificate shall not issue without leave of the court, to be obtained upon an *ex parte* application."

The present *Judicature Act* and Supreme Court of Ontario Rules of Practice, and the proposed Act and Rules of Civil Procedure, do not obligate the party, who obtains a certificate and registers it, to notify the landowner of such registration.<sup>24</sup> As a result, the landowner may be surprised and embarrassed to learn that his property is the subject of a claim. He may suffer damages as a result; for example, a proposed sale, or other disposition, of the land may be aborted because of the registration of a certificate or caution. Another important respect in which the existing provisions are deficient is the failure to indicate the onus borne by an applicant.<sup>25</sup>

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<sup>22</sup> *Report, supra* note 1, s. 6, Rule 42.02.

<sup>23</sup> *Id.*, Rule 42.03.

<sup>24</sup> Compare the *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 81(1), which requires a judgment creditor who has registered a judgment against the title to land to give notice "to the owner against whose title the judgment has been registered."

<sup>25</sup> There is some suggestion that a *lis pendens* will be granted only if a *prima facie* right to any "title to or interest in land" is established: see *Dileo v. Ginnell*, [1968] 2 O.R. 32 (Master S.C.). This view must be questioned because of the attitude that the courts have shown on applications to vacate a *lis pendens*: e.g., *Inwood v. Ivey*, [1939] O.W.N. 56, [1939] 2 D.L.R. 101, where it was held that a *lis pendens* ought not to be vacated unless it is shown that in no possible circumstances can the claim of the plaintiff, as endorsed on the writ, and as it may be developed in the pleadings, give any right in the lands in question. In another case, it was held that a showing that there is a triable issue between the parties as to an interest in land will support a *lis pendens*: see *Procopio v. D'Abbondanza*, [1970] 1 O.R. 127 (C.A.). More recently, Steele J., in *Freedman v. Lawrence* (1978), 18 O.R. (2d) 423, 82 D.L.R. (3d) 747, 6 C.P.C. 24 (H.C.), stated the test for the vacating of a *lis pendens* somewhat differently. In his opinion, a court should vacate a *lis pendens* only where it is shown that the plaintiff's action is an abuse of process or that the plaintiff cannot possibly succeed in obtaining an interest in the land in question. Compare, however, the *obiter dicta* of Hollingworth J., in *Arnett v. Menke* (1979), 11 C.P.C. 263 at 273 (Ont. H.C.), suggesting that, where the equities are strongly weighted in favour of the defendant, the equities should prevail.



### B. *Order for Preservation of Property*

Rule 372 of the existing Supreme Court of Ontario Rules of Practice enables a party to an action to obtain an "order for the detention or preservation of property, being the subject of the action upon such terms as seem just."<sup>26</sup> In this context, reference should also be made to Rules 369, 370 and 371. Rule 369 empowers the court, where a dispute arises out of a contract, to order the preservation or interim custody of property, the title to which is in dispute. Rule 370 gives the court the general power to order the sale of "any goods, wares or merchandise that may be of a perishable nature or likely to be injured from keeping," or for any other reason supporting an immediate sale. Rule 371 provides as follows:

371. Where a plaintiff seeks to recover specific property other than land, and the defendant does not dispute the title of the plaintiff, but claims to retain the property by virtue of a lien or otherwise as security for money, the court may order that the plaintiff pay into court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum, if any, for interest and costs as the court directs, and that, upon such payment into court being made, the property claimed be given up to him.

The counterpart to these provisions in the proposed Rules of Civil Procedure are Rules 35.02 to 35.04, which provide as follows:

35.02 The court may make an order for the custody, detention or preservation of any personal property in question in the action or relevant to any issue in the action and, where any such property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order the sale thereof in such manner and upon such terms as to the court may seem just.

35.03 Where the right of any party to a specific fund is in dispute, the court may order the fund to be paid into court or otherwise secured on such terms, if any, as to the court may seem just.

35.04 Where any party from whom the recovery of personal property is claimed does not dispute the title of the party making the claim, but seeks to retain the property as security for monies alleged to be owing to him, by virtue of a lien or otherwise, the court may order the party claiming recovery of the property to pay into court, or otherwise secure the monies alleged to be owing and such further sum, if any, for interest and costs as the court may direct. Upon compliance with the order, the property in question shall be delivered to the party claiming recovery thereof and the monies in court or the security as furnished shall abide the event of the action.

Under Rule 35.02, it is clear that preservation orders are available only with respect to personal property. Further, the court is expressly authorized to order the sale of property subject to a preservation order where the property is of a perishable nature or likely to deteriorate or for any other reason. Finally, provision is made for the securing, by payment into court or other-

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<sup>26</sup> For a brief description of this remedy, see Grossberg, *Recovery of a Chattel (including Interim Preservation of Property and Replevin)*, [1961], L.S.U.C. Special Lectures 65 at 71-72. See also Williston and Rolls, *supra* note 20, Vol. 2, at 967-70. The prejudgment relief nature of this remedy was made abundantly clear by Jessel M.R. in *Polini v. Gray* (1879), 12 Ch. D. (C.A.) 438 at 443, where he stated that the underlying principle of the rule was "that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation, and not to obtain merely a barren success."

wise, of any specific fund the right to which is in dispute. Proposed Rule 35.03 differs substantially from the existing Rule 369. The Rules respecting preservation orders are also deficient in a number of significant ways. For example, Rules 35.02 to 35.04 are silent on the question whether a person seeking a preservation order must give the opponent notice of the application.<sup>27</sup> Again, the Rules make no mention of the onus the claimant must satisfy in order to be entitled to a preservation order.<sup>28</sup> In other words, does the claimant have to satisfy the court that the litigation will be successful; or would proof of a *prima facie* case be satisfactory?<sup>29</sup> Alternatively, could the claimant simply establish that the action commenced raises a viable issue? Nor do the Rules in question give any indication of the kinds of circumstances that will support a court issuing a preservation of property order.<sup>30</sup> The gaps in these Rules raise serious issues of public policy.

### C. Order for the Interim Recovery of Personal Property

The third prejudgment remedy, described briefly in this Part of the paper, is an order for the interim recovery of personal property, governed by section 51 of the proposed *Judicature Act* and Rule 44 of the proposed Rules of Civil Procedure. The equivalent to an order for interim recovery under the present law is an order for replevin. The *Replevin Act*<sup>31</sup> outlines the circumstances in which such relief is available, while the procedure to be followed in securing an order for replevin is dealt with in Rules 359 to 368 of the Supreme Court of Ontario Rules of Practice. The Committee was of the view that, since replevin was a procedural matter, it should be governed

<sup>27</sup> As a result of some very early cases, it would appear that the order may be made on an *ex parte* application in appropriate circumstances: see *Hennessey & Co. v. Rohmann, Osborne & Co.* (1877), 36 L.T. 51 (Ch.); *Mitchell v. Darley Main Colliery Co.* (1883), 10 Q.B.D. 457, 31 W.R. 549, 52 L.J. Q.B. 394; and *Meluish v. Milton* (1876), 3 Ch. D. 27, 24 W.R. 679, 35 L.T. 82 (C.A.). Ordinarily, however, it should be made upon notice: *Habershon v. Gill*, [1875] W.N. 679, [1875] Bitt. Prac., Cas. 45, 1 Chap. Cham. Cas. 14.

<sup>28</sup> For a recent case under Rule 46 of the B.C. Rules of Court, 1976 equivalent of proposed Rule 35.02 and of Ontario's present Rule 372, see *Nicoll v. Oakes* (1979), 17 B.C.L.R. 356 at 363, 14 C.P.C. 144 at 152 (S.C.), where Fulton J. stated that:

... the question raised or to be raised, and in respect of which the protection of the order is sought, must be one which is serious, which is going to require determination by the court, and which arises or will arise between the applicant and some person who is also before the court... or, if it is interlocutory, as a result of some other process in which the persons involved are also parties.

<sup>29</sup> See e.g., *Douglas, Rogers Ltd. v. Henderson* (1972), 5 N.S.R. (2d) 396, 28 D.L.R. (3d) 106 (S.C.T.D.), followed in *Carl B. Potter v. Anil Canada Ltd.* (1975), 65 D.L.R. (3d) 758 (N.S.S.C.T.D.).

<sup>30</sup> See *Henderson, id.* (possibility of the property "disappearing" before final adjudication; the possibility of the applicant suffering irreparable harm from the loss of the property) and *Société Pour l'Administration du Droit de Réproduction Mécanique des Auteurs v. Trans World Record Corp.*, [1977] 2 F.C. 602, 17 N.R. 162 (Fed. C.A.) (balance of convenience between the parties).

<sup>31</sup> R.S.O. 1980, c. 449. For a discussion of this remedy, see Grossberg, *supra* note 26; Campbell, *Declaratory Judgments and Interim Orders*, [1979] L.S.U.C. Special Lectures 157 at 173-75; Morris, *Replevin* (1980), 2 Adv. Q. 188.

by the new *Judicature Act* and, therefore, that the *Replevin Act* should be repealed.<sup>32</sup> The Committee, however, did not recommend any substantial change to the law of replevin.

Under what circumstances will an order for the interim recovery of personal property be available once the recommendations of the Committee have been made law? Section 51(1) of the proposed *Judicature Act* states as follows:

51.- (1) In any action in which the recovery of personal property is claimed, and it is alleged that the property was unlawfully taken from the possession of the plaintiff, or is unlawfully detained by the defendant, the plaintiff may apply to the court for an interim order for its recovery.

Undoubtedly, there is some overlap between this provision and the Rules governing orders for the preservation of personal property. Yet, section 51 goes on to deal with a host of questions not covered by the proposed Rules 35.02 to 35.04. The defendant's right to claim damages, for example, is prescribed by section 51(2), which provides as follows:

51.- (2) Where a plaintiff recovers possession of personal property, pursuant to an interim order under subsection (1), but fails in his action, he is liable to the defendant for any loss sustained by the defendant resulting from the interim recovery of the property.

Section 51(3) outlines the right of a plaintiff in certain circumstances to assert a claim for damages against the defendant.

51.- (3) Where the defendant recovers possession of the property by reason of having the interim order obtained by the plaintiff set aside and the plaintiff succeeds in his action, the defendant is liable to the plaintiff for any loss sustained by the plaintiff resulting from the property having been returned to the possession of the defendant.

One must ask why the Committee did not see a need for similar provisions when property is "recovered" by means of a preservation order, rather than by an order for the interim recovery of personal property? Certainly, the risks for the parties appear to be similar, if not identical, where resort is had to the prejudgment remedy of a preservation order. Perhaps even more surprising than the failure of the Committee to include provisions equivalent to section 51(2) and (3) in Rule 35 of the proposed Rules dealing with preservation orders, is the fact that section 50 of the new *Judicature Act*, concerned with certificates of pending litigation, contains no provision similar to section 51(3). It will be recalled that section 50 authorizes the issuance of a certificate of pending litigation where "any title to or interest in land is brought in question by a proceeding." Section 50(4) makes "[a]ny party who registers a certificate . . . without a reasonable claim to title to or interest in the land . . . liable for any damages sustained by any person as a result of its registration." This subsection is similar to section 51(2), described above. Yet, even though a court is given power to vacate the registration of a certificate of pending litigation, just as a court may rescind an order for the

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<sup>32</sup> Letter from W.B. Williston Q.C. to the Hon. R.R. McMurtry in *Report, supra* note 1, s. 1, at 13.

interim recovery of personal property, section 50 contains no provision permitting the plaintiff to assert a claim for damages against the defendant. This statutory variance would seem to be inexplicable.

Compare also sections 50(5) and 51(4) of the proposed *Judicature Act*. The former permits a claim for damages to be asserted "in the same proceeding or in a separate proceeding" where a certificate has been registered without a reasonable claim to title to or interest in the land. Section 51(4), on the other hand, would seem to require a claim for damages under section 51(2) or (3) to be made in the original action. The plaintiff must claim them in the action; the defendant is to claim any damages he has suffered as a result of an order for interim recovery of personal property by way of counterclaim.

Equally significant are the detailed procedural provisions applicable to the prejudgment remedy of interim recovery of personal property. The governing Rule under the Committee's proposals is Rule 44. Pursuant to Rule 44.01(2), the defendant must be served with a Notice of Motion for an order for the interim recovery of personal property, "unless the court is satisfied that the property was unlawfully taken from the plaintiff or that there is reason to believe that the defendant may attempt to prevent recovery of the property or that, for any other sufficient reason, the order should be made without notice." Rule 44.01(1) also outlines in some detail the necessary contents of the plaintiff's affidavit in support of a motion for such an order.<sup>33</sup>

Again, Rule 44 sets out in considerable detail the broad discretion of the court on a motion for an order for the interim recovery of personal property. Where the defendant has been served with a copy of the Notice of Motion, the court, under Rule 44.03(1), may:

- (a) order the plaintiff to pay into court twice the value of the property as stated in the order or such other amount as the court may direct, or to give the appropriate sheriff security in such form and amount as may be approved by the court, and direct the sheriff to take the property from the defendant and deliver it to the plaintiff;
- (b) order the defendant to pay into court twice the value of the property as stated in the order, or such other amount as the court may direct, or to give to the plaintiff security in such form and amount as may be approved

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<sup>33</sup> Rule 44.01(1) states as follows:

44.01(1) An interim order for the recovery of personal property may be obtained on a motion by the plaintiff supported by affidavit containing,

- (a) a sufficient description of the property sought to be recovered to render it readily identifiable;
- (b) the value of the property sought to be recovered;
- (c) a statement that the plaintiff is the owner or lawfully entitled to possession of the property, as the case may be;
- (d) a statement that the property was unlawfully taken from the possession of the plaintiff or unlawfully detained by the defendant, as the case may be; and
- (e) the facts and circumstances giving rise to the unlawful taking or unlawful detention.

- by the court, and allow the property to remain in the possession of the defendant; or  
 (c) make such other order as may seem just.

If the motion for an interim order is *ex parte*, the court may "order the plaintiff to pay into court twice the value of the property as stated in the order, or such other amount as the court may direct, or to give the appropriate sheriff security in such form and amount as may be approved by the court,"<sup>34</sup> as in the case of a motion upon notice to the defendant. The sheriff in such a case, however, should be directed "to take and detain the property for a period of 10 days after service of the interim order upon the defendant before delivering it to the plaintiff."<sup>35</sup> Presumably, this delay period has been included to allow the defendant to apply to the court under Rule 44.05 "to rescind or vary" the interim order. Rule 44.05 provides:

44.05 The defendant may apply to the court at any time to rescind or vary an interim order for the recovery of personal property, or to stay proceedings thereunder, or for any other relief with respect to the return, safety or sale of the property or any part thereof by Notice of Motion served within 10 days and returnable within 15 days after the order came to his attention.

Finally, reference should be made to Rule 44.08 of the proposed Rules, which has no precursor in the existing Supreme Court of Ontario Rules of Practice. This Rule provides that, if the sheriff advises the plaintiff that the defendant has prevented him from recovering the property or any part of the property referred to in the interim order, "the plaintiff may apply for an order directing the sheriff to take any other personal property of the defendant." This provision adds flexibility to the remedy of interim recovery of personal property, and provides the plaintiff with greater prejudgment relief than is the case at present under the *Replevin Act*<sup>36</sup> and the Supreme Court of Ontario Rules of Practice.<sup>37</sup>

#### D. *Setting Aside of a Default Judgment Upon Terms*

Like the existing Supreme Court of Ontario Rules of Practice, the proposed Rules contain detailed provisions respecting default judgment. When and how to obtain a default judgment are matters that are beyond the scope of the present paper. What will be focused on, however, are the powers of a court when it sets aside a default judgment. Rule 526 of the present Rules does not provide much assistance in this regard, as the Rule states simply that "[a]ny judgment by default may be set aside on motion." The simple language of this Rule, however, masks the abundant case law concerned with the courts' powers in such circumstances.<sup>38</sup> It has been held, for example, that "[w]here a judgment has been obtained irregularly the defendant is entitled to have it set aside *ex debito justitiae*, in which case he does not

<sup>34</sup> *Report, supra* note 1, s. 6, Rule 44.02(a).

<sup>35</sup> *Id.*

<sup>36</sup> R.S.O. 1980, c. 449.

<sup>37</sup> R.R.O. 1980, Reg. 540.

<sup>38</sup> See 3 *Holmested and Gale, supra* note 20, at 2327-40 (Rel. 13, Mar. 1980).

have to show a defence on the merits or explain any delay, and *terms should not be imposed*.”<sup>39</sup> If, on the other hand, “the judgment sought to be set aside is regular, the defendant must show a substantial ground of defence. If merits are shown and an excuse for the default is given, the judgment may be set aside in the discretion of the court, *but terms may be imposed*.”<sup>40</sup>

In recent years, there has been some question about the authority of the court to impose, as one of the terms upon which a regularly obtained judgment will be set aside, the condition that any writ of execution issued pursuant to the judgment is not to be withdrawn. Given the general binding effect of a writ of execution under section 10 of the *Execution Act*,<sup>41</sup> the significance of such a term should be obvious. Section 10(1) of the *Execution Act* provides:

10.-(1) Subject to *The Land Titles Act* and to section 11, a writ of execution binds the goods and lands against which it is issued from the time of the delivery thereof to the sheriff for execution, but save as to bills of sale and chattel mortgages, no writ of execution against goods prejudices the title to such goods acquired by a person in good faith and for valuable consideration unless such person had, at the time when he acquired his title, notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached has been delivered to the sheriff and remains in his hands unexecuted.

Consequently, under this provision the defendant, practically speaking, would be unable to dispose of any land bound by the writ. The defendant, however, could still deal effectively with his goods, since a purchaser thereof in good faith, for valuable consideration and without notice of the writ, would acquire a good title to the goods.<sup>42</sup>

This particular type of prejudgment relief, as stated previously, has been the subject of some controversy in Ontario. In *Jet Power Credit Union Ltd. v. McNally*,<sup>43</sup> O’Driscoll J. concluded that, although a court may impose onerous conditions, including the payment into court of the sum in dispute,<sup>44</sup> when setting aside a default judgment, it did not have the power to continue a writ of execution. Mr. Justice O’Driscoll’s reasons for so holding were as follows:

Execution cannot issue before judgment; even after judgment, execution cannot issue if the judgment has been satisfied because, in the words of Farwell L.J.: “there is no judgment left on which to base the writ.” Execution owes its validity to the existence of an unpaid judgment. Once a judgment, upon which the writ of execution is based is set aside, the execution ceases to be valid and the Court in the exercise of its jurisdiction cannot impose a term that “the

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<sup>39</sup> Williston and Rolls, *supra* note 20, Vol. 1, at 515 [Emphasis added].

<sup>40</sup> *Id.* at 516 [Emphasis added].

<sup>41</sup> R.S.O. 1980, c. 146, s. 10.

<sup>42</sup> For a detailed discussion of the effect of s. 10(1) of the *Execution Act*, R.S.O. 1980, c. 146, see O.L.R.C. *Report*, *supra* note 7, Part II, at 14-21.

<sup>43</sup> (1973), 17 O.R. (2d) 59 (H.C.).

<sup>44</sup> See e.g., *Bank of Montreal v. Herrmann*, [1975] 2 W.W.R. 368 (Sask. Q.B.) and *MacFarlane v. Briggs* (1976), 15 N.B.R. (2d) 297 (Q.B.).

execution stands as security pending trial, but that its operation be stayed" because such an order would be self-contradictory.<sup>45</sup>

The decision of O'Driscoll J. in the *Jet Power* case, however, has now been overruled. In *Canadian Imperial Bank of Commerce v. Sheahan*,<sup>46</sup> Hughes J., speaking for a majority of the Ontario Divisional Court, decided that *Jet Power* had been wrongly decided. After reviewing a great many of the cases<sup>47</sup> in which a court had resorted to the practice criticized by Mr. Justice O'Driscoll, Hughes J. remarked:

It seems, however, to be well established that writs of *fiery facias*, like other writs, enjoy independent existence. Sir William Holdsworth's *A History of English Law*, 2nd ed., vol. IX, at p. 259, quotes H.J. Stephen's work on Pleading to the effect that in early times "writs of execution are supposed to be actually awarded by the judges in court; but no such award is in general actually made." In *Cotes v. Michill et al.* (1681), 3 Lev. 20, 83 E.R. 555, it was held that where action for trespass was brought against a bailiff and a lessor in ejectment, the bailiff pleading the writ and the plaintiff demurring because no judgment was shown upon which the writ was founded: "The plea is good, for the Sheriff and his Bailiffs are bound to obey the King's Writs without Enquiry after the Judgment. But if the Party himself had justified, he must have shewn a Judgment as well as a writ." The principle that the Sheriff must obey the King's writs and not look behind to the judgments upon which they are based has, as far as I know, never been disturbed. . . .

If, therefore, it is conceded, as I think it must be, that a writ of *fiery facias* has a separate existence and is not merely an appendage to judgment, there is nothing in my view which inhibits the procedure resorted to by so many Judges and Masters of this Court, and one which must be well within its inherent powers.<sup>48</sup>

Although one may well take issue with the reasoning of the Court in *Sheahan*, a critique of this decision is beyond the scope of this paper.<sup>49</sup> What is important to note is the fact that the Committee has codified the approach adopted by the Divisional Court in *Sheahan*. Rule 21.08 of the proposed Rules reads:

21.08-(1) Any judgment signed by the registrar against a party noted in default may be set aside or varied by the court, upon such terms as may seem just.

(2) Any judgment obtained on a motion for judgment on the Statement of Claim, either before or at the trial, may be set aside or varied by a judge on such terms as may seem just.

<sup>45</sup> *Supra* note 43, at 64.

<sup>46</sup> (1978), 22 O.R. (2d) 686, 94 D.L.R. (3d) 576 (Div. Ct.).

<sup>47</sup> See e.g., *Whelihan v. Kehoe* (1910), 2 O.W.N. 166 (H.C.); *Brown v. Coleman Development Co.* (1913), 4 O.W.N. 728 (S.C.); *Hunter v. Perrin* (1917), 12 O.W.N. 200 (H.C.); *Teasdale v. Welsh* (1920), 19 O.W.N. 246 (H.C.); *Staples and Bell Inc. v. Canadian Coal Supply* (1925), 28 O.W.N. 286 (H.C.); and *Briar Investments Ltd. v. Mintz*, [1971] 2 O.R. 747 (Master S.C.). See also *Cotton v. Dempster*, [1925] 1 W.W.R. 954 (Alta. S.C.) and *Herrmann*, *supra* note 44, at 371, citing *Sales v. Sereda* (1952), 5 W.W.R. (N.S.) 470 (Sask. Q.B.).

For an interesting recent case, see *Larnu Distributors (1970) Ltd. v. Brochu* (1980), 26 A.R. 373 (Q.B.), where the Court also considered the plaintiff's right to share in the proceeds realized in the sale of any of the property bound under *The Execution Act*, R.S.A. 1970, c. 128. In Ontario, see the *Creditors' Relief Act*, R.S.O. 1980, c. 103.

<sup>48</sup> *Supra* note 46, at 691-92 (O.R.), 581-82 (D.L.R.).

<sup>49</sup> It is one thing to say that a sheriff need not look behind a writ of execution. It is quite another to say that a court, setting aside a judgment obtained by default, is authorized to allow any writ obtained as a result of the default judgment to stand.

(3) As a term of setting aside a default judgment, the court may, where appropriate, allow any Writ of Seizure and Sale issued pursuant to the default judgment to remain on file in the office of a sheriff, or in an office of Land Titles, pending the final disposition of the action, on condition that any proceedings to enforce the Writ of Seizure and Sale be stayed in the meantime or otherwise as the court may order.

Of particular interest with respect to Rule 21.08(3) is the fact that this provision does not seem to draw any distinction between a default judgment regularly obtained and one that has not been obtained regularly. And while the proposed Rules would do away with specially endorsed writs now available pursuant to Rule 33 of the Supreme Court of Ontario Rules of Practice, and the problems engendered thereby,<sup>50</sup> the distinction between a regularly and an "irregularly" obtained default judgment would appear still to be relevant under the new Rules. For instance, Rule 21.04 of the proposed Rules specifies the cases in which a plaintiff may require the registrar to sign judgment against the defendant. This right is available, for example, where the plaintiff's claim is in respect of "a debt or a liquidated demand in money."<sup>51</sup> Given the difficulty that the courts have encountered in deciding when a claim is for a liquidated demand in money under present Rule 33,<sup>52</sup> it is not too hard to envisage the courts being plagued with the same problem under Rule 21.04. Therefore, as has already been indicated, it may be quite significant that Rule 21.08 seems to be applicable generally to all default judgments.

As is the case with the other prejudgment remedies prescribed by the proposed Rules, Rule 21.08 leaves many questions unanswered. The Rule gives no indication of the kinds of situations in which it would be appropriate for the court to insist, as a term of setting aside a default judgment, that "any Writ of Seizure and Sale issued pursuant to the default judgment [should] remain on file in the office of a sheriff, or in an office of Land Titles pending the final disposition of the action. . . ." Nor does the Rule give any indication of the strength of the plaintiff's case that would justify the imposition of such a condition.<sup>53</sup> Unlike the provisions in the proposed *Judicature Act* concerning the interim recovery of personal property,<sup>54</sup> Rule 21.08 is silent on the right of the defendant to claim damages from the plaintiff if the latter ultimately fails in his action.

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<sup>50</sup> See Bogart, *Summary Judgment* (1981), 19 Osgoode Hall L.J.

<sup>51</sup> Proposed Rule 21.04(1)(a).

<sup>52</sup> See 1 *Holmsted and Gale*, *supra* note 20, at 742-43 (Rel. 15, Oct. 1980), where some of these cases are collected. For some recent efforts to end this controversy, see *Kennedy v. 315812 Ont. Ltd.* (1976), 2 C.P.C. 281 (Ont. H.C.); *Rasins v. Place Park (Windsor) Ltd.* (1977), 4 C.P.C. 63 (Master Ont. S.C.), *High Point Mngt. Services Ltd. v. Royal Bengal Restaurant Ltd.* (1978), 19 O.R. (2d) 133, 6 C.P.C. 263 (Master S.C.); *Hammond v. Parsons* (1978), 19 O.R. (2d) 162 (Master S.C.).

<sup>53</sup> Interestingly, a defendant will only succeed in having such a default judgment set aside by showing "a substantial ground of defence": see 1 Williston and Rolls, *supra* note 20, at 516. Therefore, it would seem rather difficult to justify prejudgment relief on the basis of the strength of the plaintiff's case.

<sup>54</sup> Section 51.



### E. *Security for Costs*

A rather specialized prejudgment remedy available under the present Supreme Court of Ontario Rules of Practice that would continue to be available under the proposed Rules is an order for security for costs.<sup>55</sup> The present practice regarding the obtaining of an order for security for costs would be little changed under new Rule 58. The circumstances in which such an order may be made would be somewhat narrower under Rule 58 than under the existing Rule. The courts, however, would continue to have a wide discretion to grant an order for security for costs, for Rule 58.01 states:

58.01 In any action a plaintiff may be ordered to furnish security for costs where it appears that,

- (a) he is ordinarily resident out of Ontario;
- (b) the defendant has a judgment or order against the plaintiff for costs in another action, and those costs remain unpaid in whole or in part;
- (c) his is a nominal plaintiff, and there is good reason to believe that he has not sufficient assets in Ontario to pay the costs of the defendant if ordered to do so;
- (d) it is a corporation, and there is good reason to believe that it has not sufficient assets in Ontario to pay the costs of the defendant if ordered to do so; or
- (e) the defendant is entitled by any statute to security for costs.

In the context of the present discussion, proposed Rule 58 raises some important questions. For example, should a court on an application for an order for security for costs be concerned with the merits of the plaintiff's action? Under existing law, it would appear that it is improper for a court to consider the merits of the action.<sup>56</sup> Such a state of affairs would seem to be rather harsh on a plaintiff with meagre funds who has a strong claim against the defendant.

Another question upon which the Rule is silent is whether the court may consider the plaintiff's means under Rule 58.01(a), (b) and (e). Why should the mere fact of non-residency result in an order for security for costs, if it is clear that the plaintiff has substantial property within the jurisdiction available to execution? Under the present law, the court, it would seem, may take into account the plaintiff's means under Rule 373.<sup>57</sup> Undoubtedly, the courts will have to determine whether the present law is applicable to new Rule 58.

A third issue that may be raised in respect of new Rule 58 is the follow-

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<sup>55</sup> R.R.O. 1970, Reg. 545, r. 373 *et seq.* The present rule provides that security for costs may be granted in the following circumstances:

373.-(1) Security for costs may be ordered,

- (a) where the plaintiff resides out of Ontario;
- (b) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario;
- (c) where the plaintiff has brought another action or proceeding for the same cause which is pending in Ontario or in any other country; . . .

<sup>56</sup> See 1 Williston and Rolls, *supra* note 20, at 564.

<sup>57</sup> *Id.*, Vol. 1, at 577.

ing: should the defendant who has succeeded in obtaining an order for security for costs, but who has been found liable to the plaintiff, be subject to any sanction? Should the defendant in such a case, for example, be liable to a claim for any damages suffered by the plaintiff forced to provide security, as is permitted in the case of a plaintiff who has secured an order for the interim recovery of personal property but has failed in his action against the defendant? Although not identical, the circumstances would seem analogous.

#### F. Conclusion

This Part of the paper described in very general terms the prejudgment remedies to be found in the new *Judicature Act* and Rules of Civil Procedure proposed by the Civil Procedure Revision Committee. What is most striking about the provisions respecting certificates of pending litigation, orders for the preservation of personal property, orders for the interim recovery of personal property, orders to maintain on file a writ of seizure and sale as a condition for the setting aside of a default judgment, and orders for security for costs, is their lack of uniformity. While some deal expressly with the question of notice, others do not; while some provide a remedy for the plaintiff or defendant, as the case may be, for damages suffered as a result of the prejudgment relief being granted, others do not; and while some deal specifically with the powers of the court to vary the particular order, others do not. None of the provisions for prejudgment relief examined in this Part outlines the onus that rests on the person seeking relief. Because the Committee did not include a detailed discussion of the provisions of either the proposed *Judicature Act* or the proposed Rules of Civil Procedure, one can only intuit the basis for the different treatment accorded each of the remedies in question.

### III. THE *MAREVA* INJUNCTION: THE ENGLISH EXPERIENCE

As previously indicated in the introduction, there have been two noteworthy developments in the area of prejudgment remedies in Ontario: the Report of the Civil Procedure Revision Committee and the rise of the *Mareva* injunction. Part I of this paper focused on the proposals or recommendations of the Civil Procedure Revision Committee respecting prejudgment relief. This Part examines the development of the *Mareva* injunction as a more comprehensive solution to the problems of prejudgment relief. Part III is divided into three sections. The first section describes the creation of the *Mareva* injunction in England. In the second section, the scope of this jurisdiction is examined. Matters ancillary to the granting of a *Mareva* injunction are reviewed in the third section.

It is not maintained that the *Mareva* injunction can replace all the prejudgment remedies discussed in Part II. The *Mareva* injunction, however, is a sound and practical alternative to some of those remedies, for example, a certificate of pending litigation and an order for the preservation of property. In addition, the *Mareva* injunction jurisprudence is an important prece-

dent for the manner in which the competing interests of debtor, creditor and third parties may be balanced.

#### A. *The Rise of the Mareva Injunction in England*

The *Report of the Committee on the Enforcement of Judgment Debts*,<sup>58</sup> published in England in 1969, contained the following statement regarding the power of the English courts to grant an interlocutory injunction to restrain a defendant from disposing of his assets: "It is, we think, clear that at the present time an injunction under this section [45(1) of the *Supreme Court of Judicature (Consolidation) Act 1925*] would not be granted to restrain a debtor from disposing of assets or removing them from the jurisdiction."<sup>59</sup> Few persons, if any, in 1969 doubted the correctness of this description of the law. After all, it was supported by long standing authority.<sup>60</sup> Therefore, it must have come as quite a surprise to the authors of the *Report of the Committee on the Enforcement of Judgment Debts* to discover in the middle of the last decade that as a result of a trilogy of cases,<sup>61</sup> courts in

<sup>58</sup> Payne Committee (Cmnd. 3909, 1969).

<sup>59</sup> *Id.* at 324, para. 1251. The report recommended that such a prejudgment injunction should be available in certain cases. The Committee was particularly impressed by recent technological changes making the disposition of one's assets simpler and speedier:

1252. Under modern conditions of travel, particularly as the cost of air travel is now within the means of many a debtor, the risk of goods and chattels, or substantial sums of money being taken out of the country is greatly increased. It is possible to imagine countless circumstances in which a power to restrain a debtor could be justified but one will suffice. A debtor may buy valuable jewellery on credit, ignore demands for payment and ignore a writ or summons. The jeweller may not know where the jewellery is. If he happens to discover that the debtor has booked an air passage and proposes to leave England a few days later and before any progress can be made with the action which has been commenced is there anyone who would argue in these days that the court should not have power to order that the debtor should not remove the jewellery from the jurisdiction or otherwise dispose of it?

See also *Third Chandris Shipping Corp. v. Unimarine SA*, [1979] Q.B. 645 at 670, [1979] 3 W.L.R. 122 at 139, [1979] 2 All E.R. 972 at 986, [1979] 2 Lloyd's Rep. 184 at 190, *per* Lawton L.J.:

Nowadays defaulting on debts has been made easier for the foreign debtor by the use of corporations, many of which hide the identities of those who control them, and of so-called flags of convenience, together with the development of world wide banking and swift communications. By a few words spoken into a radio telephone or tapped out on a telex machine bank balances can be transferred from one country to another and within seconds can come to rest in a bank which is untraceable or, even if known, such balances cannot be reached by any effective legal process.

<sup>60</sup> See *e.g.*, *Stubbs*, *supra* note 14.

<sup>61</sup> The reported English cases dealing with the *Mareva* injunction jurisdiction are numerous. The cases include the following: *Nippon Yusen Kaisha*, *supra* note 13; *The Mareva*, *supra* note 2; *Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, [1978] Q.B. 644, [1977] 3 W.L.R. 518, [1977] 3 All E.R. 324, [1977] 2 Lloyd's Rep. 397 (C.A.); *Siskina v. Distos Compania Naviera SA*, [1979] A.C. 210, [1977] 3 W.L.R. 818, [1977] 3 All E.R. 803, [1978] 1 Lloyd's Rep. 1 (H.L.); *Cretanor Maritime Co. Ltd. v. Irish Marine Mngt. Ltd.*, [1978] 1 W.L.R. 966, [1978] 3 All E.R. 164; *The Rena K*, [1979] Q.B. 377, [1978] 3 W.L.R. 431,

England became empowered to grant an interlocutory injunction to restrain a debtor defendant from disposing of assets.<sup>62</sup>

The English prejudgment relief revolution began with the decision of the English Court of Appeal in *Nippon Yusen Kaisha v. Karageorgis*,<sup>63</sup> a charter party case, as many of the cases have been. The plaintiff, a large Japanese shipowner, claimed to be entitled to an injunction against the defendants to restrain them from disposing of or removing any of their assets in England, which in this case happened to be funds on deposit in a London bank. The defendants had chartered a number of the plaintiff's ships.

In granting the relief requested, Lord Denning M.R., relied on the power of the High Court to issue an injunction in all cases in which it appears to the court to be "just or convenient so to do."<sup>64</sup> His Lordship was of the view that an injunction should be granted for two reasons. First, the plaintiff had "a strong *prima facie* case."<sup>65</sup> Second, he concluded that, if an injunction were not granted in this case, the funds on deposit might be "removed out of the jurisdiction and the shipowners will have the greatest difficulty in recovering anything."<sup>66</sup> Neither Lord Denning M.R., nor Browne and Geoffrey Lane L.JJ., set out the evidence upon which they based their belief that the defendants intended to deal with the money in their account to the detriment of the plaintiff.

The *Mareva* injunction gets its name from the second of the trilogy of

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[1978] 1 Lloyd's Rep. 545; *Etablissement Esfka Int'l Anstalt v. Central Bank of Nigeria*, [1979] 1 Lloyd's Rep. 445 (C.A.); *Negocios Del Mar SA v. Doric Shipping Corp. SA*; *The Assios*, [1979] 1 Lloyd's Rep. 331 (C.A.); *Gebr van Weelde Scheepvaart Kantoort B.V. v. Homeric Marine Services*; *The Agrabele*, [1979] 2 Lloyd's Rep. 117 (Q.B.); *Montecchi v. Shimco (U.K.) Ltd.*, [1979] 1 W.L.R. 1180 (C.A.); *Iraqi Ministry of Defence v. Arcepey Shipping Co. SA*, [1980] 2 W.L.R. 488, [1980] 1 All E.R. 480, [1980] 1 Lloyd's Rep. 632 (Q.B.); *Chartered Bank v. Daklouche*, [1980] 1 W.L.R. 107, [1980] 1 All E.R. 205 (C.A.); *Barclay-Johnson v. Yuill*, [1980] 1 W.L.R. 1259, [1980] 3 All E.R. 190 (Ch.); *Allen v. Jambo Holdings Ltd.*, [1980] 1 W.L.R. 1252, [1980] 2 All E.R. 502 (C.A.); *Rahman (Prince Abdul) Bin Turki al Sudairy v. Abu-Taha*, [1980] 1 W.L.R. 1268, [1980] 3 All E.R. 409 (C.A.); *Stewart Chartering Ltd. v. C. & O. Mngt. SA*, [1980] 1 W.L.R. 460, [1980] 1 All E.R. 718 (Q.B.); *A. v. C.*, [1981] 2 W.L.R. 629, [1980] 2 All E.R. 347 (Q.B.); *Bankers' Trust Co. v. Shapira*, [1980] 1 W.L.R. 1274, [1980] 3 All E.R. 353, (1980), 124 Sol. J. 480 (C.A.); *A.J. Bekhor & Co. v. Bilton*, [1981] 2 W.L.R. 601 (C.A.); *A. v. C. (No. 2)*, [1981] 2 W.L.R. 634, [1981] 2 All E.R. 126 (Q.B.); *Searose v. Seatrain U.K. Ltd.*, [1981] 1 All E.R. 806 (Q.B.); *MBPXL Corp. v. Int'l Banking Corp.*, unrep. Aug. 28, 1975 (C.A.); *Ibrahim Shaker Co. v. Distos Compania Naviera SA*, [1977] 1 Lloyd's Rep. 404 (C.A.); *Naz v. Kaleem*, [1980] 7 C.L. 26 (Co. Ct.); *Third Chandris Shipping*, *supra* note 59.

<sup>62</sup> It would appear that this prejudgment remedy has become quite popular in England. There are now approximately twenty *Mareva* injunctions granted each month: see *Third Chandris*, *supra* note 59, at 650 (Q.B.), 126 (W.L.R.), 976 (All E.R.), *per* Mustill J.

<sup>63</sup> *Supra* note 13.

<sup>64</sup> *Supra* note 13, at 1095 (W.L.R.), 283 (All E.R.), 138 (Lloyd's Rep.); see also *Supreme Court of Judicature (Consolidation) Act, 1925*, 15 & 16 Geo. V, c. 49, s. 45(1).

<sup>65</sup> *Supra* note 13, at 1095 (W.L.R.), 283 (All E.R.), 138 (Lloyd's Rep.).

<sup>66</sup> *Id.*

cases responsible for its birth, *Mareva Compania Naviera SA v. Int'l Bulk-carriers SA (The Mareva)*,<sup>67</sup> another charter party case. There the English Court of Appeal sought to put the type of injunction granted in the *Karageorgis* case on a sound legal footing. In order to do so, the Court had to distinguish or overrule one of its own decisions, *Lister & Co. v. Stubbs*,<sup>68</sup> an authority that had not been seriously questioned in over three-quarters of a century.

In the *Mareva* case, Lord Denning M.R., refused to follow *Stubbs*, noting that section 45(1) of the *Supreme Court of Judicature (Consolidation) Act 1925*<sup>69</sup> gave the Court a broad power to grant an interlocutory injunction to protect a person's legal or equitable right. The Master of the Rolls remarked that "a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting a judgment for it,"<sup>70</sup> is entitled to protection. His Lordship conveniently ignored the many cases in which it had been decided that a creditor claiming to be entitled to relief is possessed of no legal or equitable right before judgment sufficient to support an injunction to restrain his debtor from disposing of his assets pending the trial of the action.<sup>71</sup> Roskill L.J., on the other hand, in finding in favour of the plaintiff's request for an injunction, distinguished *Stubbs* on much narrower grounds. He noted that the charter party contained a clause entitling the owners of the ship to a *lien* "upon all cargoes, and all subfreights for any amounts due"<sup>72</sup> and, accordingly, concluded that the plaintiff's application for an injunction did not fall within the four corners of the Court of Appeal's earlier decision in *Stubbs*.

The last of the trilogy of cases that firmly established the right of a creditor, before judgment, to obtain an order restraining his debtor from dealing with his assets to the creditor's detriment is *Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*.<sup>73</sup> In this case, as in the earlier two cases, the plaintiff's claim was founded upon a charter party. Unlike the *Karageorgis* and *Mareva* decisions, however, the Court in *Rasu Maritima* dismissed the plaintiff's application, but in the process took the opportunity to catalogue the conditions that a plaintiff must satisfy before a *Mareva* injunction will issue.

In *Rasu Maritima*, the plaintiff requested an interlocutory injunction to

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<sup>67</sup> *Supra* note 2.

<sup>68</sup> *Supra* note 14.

<sup>69</sup> 15 & 16 Geo. V, c. 49.

<sup>70</sup> *Supra* note 2, at 215 (All E.R.), 510 (Lloyd's Rep.).

<sup>71</sup> See e.g., *Stubbs*, *supra* note 14; *Robinson v. Pickering* (1881), Ch. D. 660, 44 L.T. 165, 29 W.R. 385; *Newton v. Newton* (1885), 11 P.D. 11, 34 W.R. 123, 55 L.J.P. 13. The Ont. cases in which it has been so held include *Burdett v. Fader* (1904), 7 O.L.R. 72, 3 O.W.R. 289 (Div. Ct.); *Bedell v. Gefaell (No. 2)*, [1938] O.R. 726 (C.A.). See also the Man. case of *Ferguson v. Ferguson* (1916), 26 Man. R. 269, 29 D.L.R. 364, 10 W.W.R. 113 (K.B.).

<sup>72</sup> *Supra* note 2, at 216 (All E.R.), 511 (Lloyd's Rep.).

<sup>73</sup> *Supra* note 61.

restrain the defendant from disposing of equipment that it had ordered and that was sitting on the Liverpool docks. The evidence before the Court indicated that the defendant had taken steps to dispose of its assets. The equipment was valued at \$12 million (U.S.), but if sold for scrap it would only bring in \$350,000. From the material before the Court, it was unclear whether ownership of the equipment had already passed to the defendant, or whether the seller still retained the right of ownership.

In this case, Lord Denning M.R., provided the historical basis for the court's new *Mareva* injunction jurisdiction. As a precedent for the *Mareva* injunction, he pointed to the remedy of foreign attachment<sup>74</sup> that was available in parts of England until well into the 19th century. He also noted the availability of similar remedies in the United States and in continental Europe.

The Master of the Rolls also rejected a number of restrictions that it had been suggested should be placed on the availability of *Mareva* injunctions. First, Lord Denning M.R., refused to limit the remedy to cases in which the plaintiff is entitled to summary judgment:<sup>75</sup> "an order restraining removal of assets can be made whenever the plaintiff can show that he has a 'good arguable case'."<sup>76</sup> Second, his Lordship was not willing to see the remedy restricted to cases in which the asset at risk is money. He cautioned, however, that "[c]are should be taken before an injunction is granted over assets which will bring the defendant's trade or business to a standstill or will inflict on him great loss."<sup>77</sup> Thirdly, Lord Denning M.R., saw no objection to employing a *Mareva* injunction as a means to compel a defendant to provide the plaintiff with security.<sup>78</sup>

The plaintiff's application for a *Mareva* injunction was rejected in this case, however, on the grounds that it was not just or convenient to grant the relief sought. There was considerable uncertainty about the validity of the plaintiff's claim. As mentioned earlier, doubt also surrounded the ownership of the goods sought to be made subject to a *Mareva* injunction. Moreover, the Court was influenced by the evidence that the goods, if sold as scrap, would fetch only a small percentage of their true value. Finally, Lord Denning M.R., noted that the property in question was bound for West

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<sup>74</sup> *Supra* note 61, at 657 (Q.B.), 524 (W.L.R.), 331 (All E.R.), 401 (Lloyd's Rep.). For a general discussion of the doctrine of foreign attachment, see Drake, *A Treatise on the Law of Suits by Attachment in the United States* (7th ed., Boston: Little Brown, 1891) ch. 1; Millar, *Civil Procedure of the Trial Court in Historical Perspective* (N.Y.: Law Centre of N.Y.U., 1952), ch. 26; Levy, *Attachment, Garnishment and Garnishment Execution: Some American Problems in the Light of the English Experience* (1972-73), 5 Conn. L. Rev. 399.

<sup>75</sup> See 1965 English Rules of the Supreme Court, Ord. 14.

<sup>76</sup> *Supra* note 61, at 661 (Q.B.), 528 (W.L.R.), 334 (All E.R.), 404 (Lloyd's Rep.).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 663 (Q.B.), 529 (W.L.R.), 335 (All E.R.), 404 (Lloyd's Rep.).

Germany, where "they will be just as much liable to seizure as in England, and probably more so."<sup>79</sup>

Before turning to a discussion of some of the other significant *Mareva* injunction cases, a few words should be said about the manner in which Lord Denning M.R., distinguished the *Stubbs* line of authorities in *Rasu Maritima*. His Lordship remarked that none of these cases had concerned a "defendant who was out of the jurisdiction but had money or goods in this country,"<sup>80</sup> save one, where the point was not canvassed. Insofar as cases respecting non-resident defendants were concerned, he believed that the principle to be applied should be that employed by the customary courts under the doctrine of foreign attachment. Towards the conclusion of his judgment Lord Denning M.R. added the following comment: "I think the courts have a discretion, in advance of judgment, to issue an injunction to restrain the removal of assets, *whether the defendant is within the jurisdiction or outside it*. This discretion should not be fettered by rigid rules."<sup>81</sup> Earlier in his judgment, however, the Master of the Rolls had stated that, "[s]o far as concerns defendants who are within the jurisdiction . . . and have assets here, it is well established that the court should not, in advance of any order or judgment, allow the creditor to seize any of the money or goods of the debtor or to use any legal process to do so."<sup>82</sup> Although the confusion engendered by these conflicting remarks of Lord Denning M.R., in *Rasu Maritima* has been laid to rest in recent years,<sup>83</sup> the controversy could have been avoided by a somewhat closer analysis of *Stubbs*.

The plaintiff in *Stubbs*<sup>84</sup> brought an action against its employee, alleging that the latter had received secret profits and commissions from one of the plaintiff's buyers. As a result, the plaintiff claimed to be entitled to an accounting and damages, and to trace the monies received by the defendant and invested by him in securities and realty. To protect its claim, the plaintiff requested an interlocutory injunction to restrain the defendant from dealing with the realty, as well as an order directing the defendant to bring

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<sup>79</sup> *Id.* Interestingly the possibility of enforcement of a judgment in a foreign jurisdiction recently has been accepted by some courts as a ground for refusing an order for security for costs. See e.g., *Greensteel Ind. Ltd. v. Binks Mfg. Co.* (1982), 35 O.R. (2d) 45 (C.A.); *Dietrich-Collins Equip. Ltd. v. Gen'l Motors of Can.* (1981), 31 O.R. (2d) 698 (H.C.J.), rev'g on other grounds (1981), 31 O.R. (2d) 687 (Master S.C.); *Richmond v. Canadian Exhibition Ass'n.* (1979), 24 O.R. (2d) 781, 104 D.L.R. (3d) 317, 11 C.P.C. 184 (H.C.J.) and *Djurasevic v. Canadian General Ins. Co.*, [1974] I.R.I. at 1-589 (N.S.C.A.). Compare *Goldberg v. DeLorey* (1980), 30 N.B.R. (2d) 395, 70 A.P.R. 395 (Q.B.). Some of the recent cases are discussed in Banfai, *The Effect of Reciprocal Enforcement of Judgments Legislation on Obtaining Security for Costs* (1980), 2 Adv. Q. 344.

<sup>80</sup> *Supra* note 61, at 659 (Q.B.), 526 (W.L.R.), 332 (All E.R.), 402 (Lloyd's Rep.).

<sup>81</sup> *Id.* at 663 (Q.B.), 530 (W.L.R.), 336 (All E.R.), 405 (Lloyd's Rep.). [Emphasis added].

<sup>82</sup> *Id.* at 659 (Q.B.), 526 (W.L.R.), 332 (All E.R.), 402 (Lloyd's Rep.).

<sup>83</sup> See text accompanying notes 105-116.

<sup>84</sup> *Supra* note 14.

the other investments and any cash into court. The Court of Appeal unanimously rejected the plaintiff's application for an injunction. In his judgment, Cotton L.J. was concerned primarily with the question whether the defendant could be *ordered to deliver up to the court* the cash and securities. He stated that he did not know of any case "where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established."<sup>85</sup> Neither Cotton L.J., nor the other members of the Court dealt expressly with the plaintiff's claim for an injunction in respect of the realty purchased with the alleged secret profits and commissions. All were of the view that the plaintiff was not entitled to trace the secret profits and commissions allegedly received by the defendant to the property purchased with this money. This was certainly the view of the judge at first instance, Stirling J.: "the Plaintiffs are not entitled to follow the money; and therefore the injunction, so far as it seeks to restrain the Defendant from dealing with the property in which this money has been, as alleged, invested, must fail."<sup>86</sup> Accordingly, *Stubbs* does not stand for the proposition that a court has no power to restrain a defendant from disposing of his property before judgment. The Court dismissed the plaintiff's claim for an injunction in that case on the basis that it had not established its right to trace. And the Court of Appeal's comments regarding prejudgment relief were made in response to the plaintiff's request to require the defendant to provide it with security, not with respect to injunctive relief of the kind provided by a *Mareva* injunction.

To this point, the birth of the *Mareva* injunction in England has been described. Passing reference has been made to the prerequisites for a *Mareva* injunction, but there has been no attempt to deal comprehensively with this subject. Attention should be turned to a consideration of the conditions that must be satisfied before a court will issue a *Mareva* injunction.

Two cases in particular are relevant to the discussion of the requirements for *Mareva* injunction relief: *Third Chandris Shipping Corp. v. Uni-marine SA*<sup>87</sup> and *Barclay-Johnson v. Yuill*.<sup>88</sup> For the purposes of the present discussion, the facts in these two cases are unimportant. In *Third Chandris*, Lord Denning M.R., set out five "guidelines" for the granting of a *Mareva* injunction, and they may be summarized as follows. First, as is the case with any application for an injunction, the plaintiff must "make full and frank disclosure of all matters in his knowledge which are material for the judge to know."<sup>89</sup> Second, and related to the first condition, the plaintiff should state with some particularity his claim against the defendant, the amount thereof, and "the points made against it by the defendant."<sup>90</sup> The third

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<sup>85</sup> *Id.* at 13 (Ch. D.), 76 (L.T.), 549 (W.R.).

<sup>86</sup> *Id.* at 11 (Ch. D.).

<sup>87</sup> *Supra* note 59.

<sup>88</sup> *Supra* note 61.

<sup>89</sup> *Supra* note 59, at 137 (W.L.R.), 984 (All E.R.), 189 (Lloyd's Rep.).

<sup>90</sup> *Id.*



guideline enunciated by Lord Denning M.R. was that the applicant for a *Mareva* injunction "should give some grounds for believing that the defendants have assets in the jurisdiction."<sup>91</sup> Fourth, the plaintiff must state the grounds for his belief "that there is a risk of the assets being removed before the judgment . . . is satisfied."<sup>92</sup> Insofar as this fourth guideline is concerned, the comments of Lord Denning M.R. are quite important. He observed that "[t]he mere fact that the defendant is abroad is not by itself sufficient."<sup>93</sup> He added, however, the following remarks with respect to foreign corporations:

No one would wish any reputable foreign company to be plagued with a *Mareva* injunction simply because it has agreed to London arbitration. But there are some foreign companies whose structure invites comment. We often see in this court a corporation which is registered in a country where the company law is so loose that nothing is known about it, where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire cat. In such cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied. Such registration of such companies may carry many advantages to the individuals who control them, but they may suffer the disadvantage of having a *Mareva* injunction granted against them. The giving of security for a debt is a small price to pay for the convenience of such a registration. Security would certainly be required in New York. So also it may be in London.<sup>94</sup>

The last of the five guidelines described by the Master of the Rolls, like the first, is not unique to *Mareva* injunctions, but is applicable to all interlocutory injunction applications. Applicants for a *Mareva* injunction must give an "undertaking in damages, in case they fail in their claim or the injunction turns out to be unjustified"<sup>95</sup> and, in appropriate cases, the undertaking should be "supported by a bond or security."<sup>96</sup>

In *Barclay-Johnson v. Yuill*, Megarry V.C. added a number of other conditions to the list of guidelines pronounced by Lord Denning M.R. in *Third Chandris*. The Vice Chancellor commented that mere proof that there is a risk of the defendant removing his assets from the jurisdiction before judgment is satisfied is not sufficient. In his opinion, the plaintiff seeking a *Mareva* injunction is required to establish as well that "there is a danger of default if the assets are removed from the jurisdiction."<sup>97</sup> He added that "[a] reputable foreign company, accustomed to paying its debts, ought not to be

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 138 (W.L.R.), 985 (All E.R.), 189 (Lloyd's Rep.).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* For a brief discussion of this condition for the obtaining of any kind of interlocutory injunction, see Sharpe, "Interlocutory Injunctions: The Post American Cyanamid Position," in Gertner, ed., *Studies in Civil Procedure* (Toronto: Butterworths, 1979) 185 at 191-92.

<sup>96</sup> *Id.*

<sup>97</sup> *Supra* note 61, at 1265 (W.L.R.), 195 (All E.R.).

prevented from removing its assets from the jurisdiction, especially if it has substantial assets in countries in which English judgments can be enforced.”<sup>98</sup>

Another important condition for a *Mareva* injunction discussed by Megarry V.C. is the need to show that “the balance of convenience is in favour of granting it.”<sup>99</sup> In this way, Megarry V.C. sought to rationalize the *Mareva* injunction line of authorities with *Stubbs* and its progeny. He stated as follows:

In considering this in *Mareva* cases, I think that some weight must be given to the principle of *Lister & Co. v. Stubbs* . . . The *Mareva* prohibition against making any disposition of the assets within the country is a normal ancillary of the prohibition against removing the assets from the country, and if this is likely to affect the defendant seriously I think that he is entitled to have this put into the scales against the grant of the injunction. Much may depend on the assets in question. If, as in many of the reported cases, there is merely an isolated asset here, the harm to the defendant may be small. On the other hand, if he is trading here and the injunction would “freeze” his bank account, the injury may be grave. I think that he should be able to rely on the *Lister* principle except so far as it cannot be fairly reconciled with the needs of the *Mareva* doctrine. I would regard the *Lister* principle as remaining the rule, and the *Mareva* doctrine as constituting a limited exception to it.<sup>100</sup>

#### B. *The Scope of the Mareva Injunction Jurisdiction*

Despite attempts to limit the circumstances in which a creditor will be able to secure a *Mareva* injunction, few restrictions have been imposed on this prejudgment remedy. As noted earlier, Lord Denning M.R. in the *Rasu Maritima* case dealt summarily with two alleged limitations on the courts’ power to restrain a defendant from disposing of his assets before judgment. The Master of the Rolls refused to limit the availability of *Mareva* injunctions to Order 14 cases, that is, cases where the plaintiff may be entitled to summary judgment.<sup>101</sup> Orr L.J. in the same case, correctly pointed out the ease with which a defendant can avoid summary judgment and the dangers of denying to the plaintiff in such a case the protection of a *Mareva* injunction.<sup>102</sup> Lord Denning M.R. in *Rasu Maritima* also rejected the suggestion that *Mareva* injunctions should be employed only in respect of money.<sup>103</sup>

There would seem to be little doubt today that a *Mareva* injunction is available in cases other than those in which the plaintiff is able to secure summary judgment. Similarly, with one exception, it would appear that it has been firmly established that any of the defendant’s assets, and not simply money, may be “frozen” by a *Mareva* injunction. It may be, however, that a *Mareva* injunction will not issue to restrain a defendant from disposing of

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* The role of this factor in applications for other types of interlocutory injunctions is discussed in considerable detail in Sharpe, *supra* note 94, at 192.

<sup>100</sup> *Supra* note 61, at 1265-66 (W.L.R.), 195 (All E.R.).

<sup>101</sup> *Supra* note 61, at 661 (Q.B.), 528 (W.L.R.), 334 (All E.R.), 403 (Lloyd’s Rep.).

<sup>102</sup> *Id.* at 655 (Q.B.), 531 (W.L.R.), 337 (All E.R.), 405 (Lloyd’s Rep.).

<sup>103</sup> *Id.* at 662 (Q.B.), 528 (W.L.R.), 334 (All E.R.), 404 (Lloyd’s Rep.).

land. In *Naz v. Kaleem*, Harris J. observed that, since the third guideline laid down in the *Third Chandris* case was that the plaintiff must show that there is a risk of the assets being removed from the country before he will be entitled to a *Mareva* injunction, this prejudgment remedy would seem to be inappropriate if the defendant's assets are immovables.<sup>104</sup> Given the following remarks of Megarry V.C. in *Barclay-Johnson v. Yuill*, the suggestion that land should be immune from a *Mareva* injunction may well be correct:

*If the assets are likely to remain in the jurisdiction, then the plaintiff, like all others with claims against the defendant, must run the risk, common to all, that the defendant may dissipate his assets, or consume them in discharging other liabilities, and so leave nothing with which to satisfy any judgment. On the other hand, if there is a real risk of the assets being removed from the jurisdiction, a Mareva injunction will prevent their removal. It is not enough for such an injunction merely to forbid the defendant to remove them from the jurisdiction, for otherwise he might transfer them to some collaborator who would then remove them; accordingly, the injunction will restrain the defendant from disposing of them even within the jurisdiction.*<sup>105</sup> [Emphasis added.]

Undoubtedly, the most controversial issue, insofar as the scope of the *Mareva* injunction jurisdiction is concerned, has been whether the remedy should be available against defendants within the jurisdiction. It will be recalled that Lord Denning M.R. in *Rasu Maritima* distinguished the long-standing authority of *Stubbs* on the basis that that case dealt with a defendant in the jurisdiction. Yet, his Lordship in the same case expressed the view that "the courts have a discretion, in advance of judgment, to issue an injunction to restrain the removal of assets, *whether the defendant is within the jurisdiction or outside it.*"<sup>106</sup>

Any confusion that the judgment of the Master of the Rolls in the *Rasu Maritima* case engendered would now appear to have been dissipated. The English courts, on a number of occasions, have been asked to issue a *Mareva* injunction against a defendant in England, and they have acceded to the request. Not surprisingly, the main proponent of the view that a defendant within the jurisdiction should be subject to a *Mareva* injunction has been Lord Denning M.R.

The issue appears to have been addressed comprehensively for the first time in the case of *Chartered Bank v. Daklouché*.<sup>107</sup> The defendants in this case were of Lebanese origin with business interests in Abu Dhabi. They had moved to England, and had established residence there, while continuing to carry on business in Abu Dhabi. In January 1979, Mr. Daklouché encountered some financial difficulties, and his Abu Dhabi account with the plaintiff bank soon became overdrawn. Despite a promise to pay off the overdraft with monies received from the payment of certain trade debts,

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<sup>104</sup> *Supra* note 61.

<sup>105</sup> *Supra* note 61, at 1264 (W.L.R.), 194 (All E.R.).

<sup>106</sup> *Supra* note 61, at 663 (Q.B.), 530 (W.L.R.), 336 (All E.R.), 405 (Lloyd's Rep.) [Emphasis added].

<sup>107</sup> *Supra* note 61.

three cheques received by the corporation controlled by the defendants were paid into an account with another bank in Abu Dhabi, and the money eventually found its way into an account in the name of Mrs. Daklouché in London, England. Upon learning of these happenings, the plaintiff bank moved immediately for a *Mareva* injunction to prevent the defendants from dealing with a sum equal to the proceeds of the trade debts that should have been deposited in the account the defendants had with the plaintiff bank.

Referring first to his initial statement in *Rasu Maritima*, in which he suggested that a *Mareva* injunction should not issue against "defendants who are within the jurisdiction of the court and have assets here," Lord Denning M.R. asserted that this statement was applicable only to "cases where defendants were permanently settled here and had their assets here."<sup>108</sup> *Daklouché* did not come within these terms, since the defendant, Mrs. Daklouché, was a Lebanese citizen, and only late in the proceedings indicated that it was her intention to live permanently in England. But, again, his Lordship was not satisfied to decide the case on the narrow basis that Mrs. Daklouché was not permanently resident in England. He went on to suggest that "[t]he law should be that there is jurisdiction to grant a *Mareva* injunction even though the defendant may be served"<sup>109</sup> in England. If the defendant "makes a fleeting visit, or if there is a danger that he may abscond or that the assets or money may disappear and be taken out of the reach of the creditors, a *Mareva* injunction can be granted."<sup>110</sup> Interestingly, nowhere in his judgment does Lord Denning M.R. refer to *Stubbs*, although the case was cited to the Court. With the stroke of his pen, the Master of the Rolls sought to alter the law of prejudgment relief in England that had, until recently, remained unchanged for nearly one hundred years.

The next assault on *Stubbs* came in the case of *Barclay-Johnson v. Yuill*,<sup>111</sup> to which reference already has been made. There Megarry V.C. dealt in considerable detail with the defendant's objection that "no *Mareva* injunction can be granted against a defendant who is not a *foreigner*."<sup>112</sup> After commenting that the "heart and core of the *Mareva* injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action,"<sup>113</sup> he stated as follows:

If, then, the essence of the jurisdiction is the risk of the assets being removed from the jurisdiction, I cannot see why it should be confined to "foreigners," in any sense of that term. True, expressions such as "foreign defendants" . . . appear in the cases, and for the most part the cases have concerned those who may fairly be called foreigners. Indeed, in the *Siskina* case . . . Lord Diplock puts the jurisdiction in terms of a foreign defendant who does not reside or have a place of business within the jurisdiction, though I would read this as being de-

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<sup>108</sup> *Id.* at 112 (W.L.R.), 209 (All E.R.).

<sup>109</sup> *Id.* at 113 (W.L.R.), 210 (All E.R.).

<sup>110</sup> *Id.*

<sup>111</sup> *Supra* note 61.

<sup>112</sup> *Id.* at 1262 (W.L.R.), 192 (All E.R.).

<sup>113</sup> *Id.* at 1264 (W.L.R.), 194 (All E.R.).

scriptive of the past rather than restrictive of the future. Naturally the risk of removal of assets from the jurisdiction will usually be greater or more obvious in the case of foreign-based defendants, and so the jurisdiction has grown up in relation to them. But I cannot see why this should make some requirement of foreignness a prerequisite of the jurisdiction. If, for example, an Englishman who has lived and worked all his life in England is engaged in making arrangements to emigrate and remove all his assets with him, is the court to say "He is not a foreigner, nor is he yet foreign-based, and so no *Mareva* injunction can be granted?" Why should it make all the difference if instead he had been a foreign national with a foreign domicile who, after living and working here for a while, was preparing to leave with his assets? Is it really to be said that in relation to *Mareva* injunctions, there is one law for the foreigner and another for the English, and that this flows from a statutory power to grant an injunction if it appears to the court to be "just or convenient" to do so? I cannot see any sensible ground for holding that in this respect there is some privilege or immunity for the English and Welsh.<sup>114</sup>

He concluded his remarks on this issue by pointing out that matters of nationality, domicile, residence and so on may well be relevant to the determination of whether there is a real risk of removal of his assets from the jurisdiction by the defendant.<sup>115</sup> He illustrated some of the ways in which these matters might be relevant:

If the defendant has not even come to this country, the risk of his assets here being removed abroad will normally be high. If a foreign national is here, his nationality will often make it easier for him at short notice to go abroad with his assets, and remain there, easier than for a citizen of the United Kingdom; and his foreign domicile would render it more probable that he would do this.<sup>116</sup>

The approach espoused by Megarry V.C. in *Barclay-Johnson v. Yuill* seems to have received the sanction of the English Court of Appeal in *Rahman (Prince Abdul) bin Turki al Sudairy v. Abu-Taha*.<sup>117</sup> Lord Denning M.R. in this case quoted approvingly the remarks of Megarry V.C. set out above, and affirmed the principle that he himself had enunciated in *Daklouché*.<sup>118</sup>

With respect to the kinds of case in which a *Mareva* injunction may be granted, the more subsidiary issue with which the courts have grappled is whether such relief should be available in non-commercial cases. The trilogy of cases that gave birth to the *Mareva* injunction, it will be recalled, each concerned a charter party dispute. And while the vast majority of cases in which a *Mareva* injunction has been requested have, indeed, been commercial cases, nevertheless, there would seem to be little doubt about the propriety of such relief in non-commercial cases.

In *Allen v. Jambo Holdings Ltd.*,<sup>119</sup> the English Court of Appeal was

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<sup>114</sup> *Id.* at 1264-65 (W.L.R.), 194-95 (All E.R.).

<sup>115</sup> *Id.* at 1265 (W.L.R.), 195 (All E.R.).

<sup>116</sup> *Id.*

<sup>117</sup> *Supra* note 61.

<sup>118</sup> *Id.* at 1271-72 (W.L.R.), 411 (All E.R.).

<sup>119</sup> *Supra* note 61. For an interesting discussion of this case, see Lord Denning, *The Due Process of Law* (London: Butterworths, 1980) at 148-49. In Ont., see *Quinn v. Marsta Session Services Ltd.* (1981), 34 O.R. (2d) 659 (H.C.J.).

required to answer the very issue posed above. The plaintiff in *Allen* was the widow of an airplane passenger who was killed by the propellor of the plane that was to carry him and his wife. The widow brought an action claiming, *inter alia*, damages under the *Fatal Accidents Act 1976*.<sup>120</sup> All three members of the Court of Appeal saw no reason to restrict the *Mareva* injunction jurisdiction to commercial cases. The matter was perhaps best summed up by Templeman L.J.:

I can see no difference between a *Mareva* injunction in a commercial action and a *Mareva* injunction for personal injury or any other cause of action save this, that in the kind of actions in which *Mareva* injunctions have been granted, where the contest is between two big commercial concerns, there is usually very little argument about the value of the cross-undertaking in damages, and there are freely available methods of security.<sup>121</sup>

Megarry V.C. in *Barclay-Johnson v. Yuill*<sup>122</sup> cited *Allen* with approval.<sup>123</sup> After pointing out that the case before him was "in some respects commercial in nature,"<sup>124</sup> the Vice Chancellor remarked that it was not the usual "sort of case that finds its way into the Commercial Court."<sup>125</sup> Given the purpose of the jurisdiction, "to prevent judgments of the court from being rendered ineffective by the removal of the defendant's assets from the jurisdiction,"<sup>126</sup> Megarry V.C. saw no basis upon which to confine it to commercial cases.

From the preceding discussion, it is apparent that the courts have employed the *Mareva* injunction in a wide variety of circumstances and that few limitations have been imposed on the availability of this important new prejudgment remedy. One significant restriction, however, has gained the approval of the House of Lords. In *Siskina (Cargo owners) v. Distos Compania Naviera SA*,<sup>127</sup> a group of cargo owners sought leave to issue a writ for service *ex juris* against the owner of the ship upon which their cargoes had been loaded. The plaintiffs claimed damages for breach of duty and an injunction to restrain the defendant from disposing of certain insurance monies payable to it by Lloyd's of London. The monies represented the defendant's only asset. The issue for the Law Lords to decide was whether a *Mareva* injunction could issue in a case where the court had no jurisdiction over the defendant, because the defendant could not be served in England, and where the plaintiff's cause of action did not fall within the terms of Order 11 of the 1965 English Rules of the Supreme Court, the equivalent to Rule 25 of the Supreme Court of Ontario Rules of Practice.<sup>128</sup>

<sup>120</sup> 24 & 25 Eliz. II, c. 30.

<sup>121</sup> *Supra* note 61, at 1258 (W.L.R.), 506 (All E.R.).

<sup>122</sup> *Supra* note 61.

<sup>123</sup> *Id.* at 1267 (W.L.R.), 197 (All E.R.).

<sup>124</sup> *Id.* at 1267 (W.L.R.), 196 (All E.R.).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1267 (W.L.R.), 197 (All E.R.).

<sup>127</sup> *Supra* note 61.

<sup>128</sup> R.R.O. 1980, Reg. 540.

The Court of Appeal had concluded that Order 11, Rule 1(1)(i), of the 1965 English Rules of the Supreme Court permitted service *ex juris* in any case where there is a "genuine claim for an injunction,"<sup>129</sup> even though the cause of action did not otherwise comply with Order 11. Order 11, Rule 1(1)(i), states as follows:

1.-(1) ...service of a writ, or notice of a writ, out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say

- (i) if in the action begun by the writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing); ...<sup>130</sup>

On appeal to the House of Lords, the decision of the Court of Appeal was reversed. Lord Diplock was of the opinion that, in order for an English court to assume jurisdiction over a foreign defendant pursuant to Order 11, Rule 1(1)(i), the underlying claim must be one that is justiciable in England:

To argue that the claim to monetary compensation is justiciable in the High Court because *if it were justiciable* it would give rise to an ancillary right to a *Mareva* injunction restraining the shipowners doing something in England pending adjudication of the monetary claim, appears to me to involve the fallacy of *petitio principii* or, in the vernacular, an attempt to pull oneself up by one's own bootstraps.<sup>131</sup>

The decision in the *Siskina* case, then, has sounded the death-knell for the establishment of a general *quasi in rem* jurisdiction similar to that exercised in most jurisdictions in the United States.<sup>132</sup> The mere fact that there is property in the jurisdiction, the transfer of which may be enjoined, does not provide a basis for an English court to acquire jurisdiction over the *lis*.

### C. *Matters Ancillary to the Mareva Injunction Jurisdiction*

In the six years since the *Mareva* injunction made its first appearance, the English courts have been called upon to deal with a host of ancillary

<sup>129</sup> [1979] A.C. 210 at 238, [1977] 3 W.L.R. 532 at 556, [1977] 3 All E.R. 803 at 816, *per* Lawton L.J.

<sup>130</sup> R. 25(1)(i) of the Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540, provides as follows:

25(1) Subject to rule 795, a party to an action or proceeding may be served out of Ontario as provided by rule 26 where the action or proceeding is against that party consists of a claim or claims ...

(i) for an injunction in respect of anything done, being done or to be done within Ontario; ...

<sup>131</sup> *Supra* note 61, at 257 (A.C.), 825-26 (W.L.R.), 825 (All E.R.), 6 (Lloyd's Rep.) *per* Diplock L.J.

<sup>132</sup> Prejudgment remedies, including prejudgment attachment, have been under attack in recent years in the United States. The United States Supreme Court, in four somewhat contradictory decisions, has examined the constitutionality of a variety of prejudgment remedies: see *Sniadach v. Family Finance Corp. of Bay View* 395 U.S. 337; 89 S. Ct. 1820 (1969); *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983 (1972); *Mitchell v. W.T. Grant Co.* 416 U.S. 600, 94 S. Ct. 1895 (1974); *North Georgia Finishing Inc. v. Di-Chem, Inc.* 419 U.S. 601, 95 S. Ct. 719 (1975).

matters. In this section, some of these matters will be discussed. Attention will be turned to: (1) *Mareva* injunctions and priorities among creditors; (2) *Mareva* injunctions and discovery; (3) variation of *Mareva* injunctions; and (4) *Mareva* injunctions and costs.

## 1. Priorities Among Creditors

What rights, if any, does a creditor who has succeeded in securing a *Mareva* injunction have in the property frozen thereby? This question was answered early on in the development of the remedy. In *Cretanor Maritime Co. Ltd. v. Irish Marine Mngt. Ltd.*,<sup>133</sup> the Court was called upon to determine the respective rights of a plaintiff having the benefit of a *Mareva* injunction and a debenture holder. Buckley L.J. drew the following distinctions between a *Mareva* injunction and an attachment:

"Attachment" must, I apprehend, mean a seizure of assets under some writ or like command or order of a competent authority, normally with a view to their being either realised to meet an established claim or held as a pledge or security for the discharge of some claim either already established or yet to be established. An attachment must fasten on particular assets. They need not, I think, be particularised in the writ or order under which the attachment is effected, but the attachment of a particular asset cannot take place unless and until it has in some manner fastened upon that asset. A *Mareva* injunction, however, even if it relates only to a particularised asset... is relief in personam. It does not effect a seizure of any asset. It merely restrains the owner from dealing with the asset in certain ways. The asset... might be said to have been in a sense arrested, but only in a loose sense. All that the injunction achieves is in truth to prohibit the owner from doing certain things in relation to the asset. It is consequently, in my judgment, not strictly accurate to refer to a *Mareva* injunction as a pre-trial attachment.<sup>134</sup>

As a result, Buckley L.J. held that a *Mareva* injunction must give way to the prior rights of the debenture holders to the fund in question.

Consistent with this ruling of Buckley L.J. the courts, on a number of occasions, have permitted a defendant subject to a *Mareva* injunction to deal with his assets in the ordinary course of business, for example, to pay debts owed to other creditors. This was the case in *Iraqi Ministry of Defence v. Arcepey Shipping Co. SA*,<sup>135</sup> where Goff J. concluded that the payment of debts with assets frozen by a *Mareva* injunction did not conflict with the purpose of this prejudgment remedy: to prevent the defendant from causing his assets to be removed from the jurisdiction in order to avoid the risk of having to satisfy any judgment eventually rendered against it.<sup>136</sup>

## 2. Discovery

To ensure the effectiveness of a *Mareva* injunction, and its equitable enforcement, the English courts have concluded that it may be necessary in

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<sup>133</sup> *Supra* note 61.

<sup>134</sup> *Id.* at 974 (W.L.R.), 170 (All E.R.), 429-30 (Lloyd's Rep.).

<sup>135</sup> *Supra* note 61. See also *A. v. C. (No. 2)*, *supra* note 60.

<sup>136</sup> *Id.* at 494 (W.L.R.), 485 (All E.R.), 636 (Lloyd's Rep.).



some cases to allow the plaintiff to discover the defendant at a very early stage in the litigation. Robert Goff J. in *A. v. C.* described a variety of circumstances in which early discovery may be necessary:

Now the exercise of this jurisdiction may lead to many problems. The defendant may have more than one asset within the jurisdiction, for example, he may have a number of bank accounts. The plaintiff does not know how much, if anything, is in any of them; nor does each of the defendant's bankers know what is in the other accounts. Without information about the state of each account it is difficult, if not impossible, to operate the *Mareva* jurisdiction properly; for example, if each banker prevents any drawing from his account to the limit of the sum claimed, the defendant will be treated oppressively, and the plaintiff may be held liable on his undertaking in damages. Again, there may be a single claim against a number of defendants: in that event the same difficulties may arise. Furthermore, the very generality of the order creates difficulty for the defendant's bankers, who may for example be unaware of the existence of other assets of the defendant within the jurisdiction; indeed, if a more specific order is possible, it may give much needed protection for the defendant's bankers, who are after all simply the innocent holders of one form of the defendant's assets.<sup>137</sup>

His Lordship was of the opinion that the courts had the power to order such discovery under the 1965 English Rules of the Supreme Court,<sup>138</sup> section 45(1) of the *Supreme Court of Judicature (Consolidation) Act 1925*<sup>139</sup> and, in appropriate circumstances, section 7 of the *Bankers' Books Evidence Act 1879*.<sup>140</sup> Insofar as the rights of the defendant were concerned, Goff J. rejected the defendant's submission that early discovery of the sort urged upon the Court by the plaintiff would be "an unwarranted invasion of the defendant's private affairs."<sup>141</sup> He stated that the defendant's interest in maintaining his privacy was outweighed by "the desirability of interrogatories in circumstances where it is *necessary* to do so for the proper exercise of the *Mareva* jurisdiction."<sup>142</sup> Otherwise, the *Mareva* jurisdiction might be rendered ineffective, "for a plaintiff, faced with lack of knowledge of the value of a specified asset . . . may . . . be deterred from giving his undertaking in damages with the result that he is unable to obtain the relief."<sup>143</sup>

The Court of Appeal in *A.J. Bekhor & Co. Ltd. v. Bilton*,<sup>144</sup> however, drew some limitations on the courts' power to order discovery in aid of a *Mareva* injunction. The plaintiff in the *Bilton* case, believing that the defendant had failed to disclose all his assets, applied for and was granted an order compelling the defendant to swear an affidavit outlining his assets and serve it on the plaintiff. On appeal, however, the English Court of Appeal over-

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<sup>137</sup> *Supra* note 61, at 632-33 (W.L.R.), 351 (All E.R.).

<sup>138</sup> *Id.* The Court suggested early discovery may be available under Ord. 24, r. 7, and Ord. 26 r. 1.

<sup>139</sup> 15 & 16 Geo. V, c. 49, s. 45(1).

<sup>140</sup> 42 & 43 Vict. c. 11, s. 7. For the equivalent provision in Ontario, see the *Evidence Act*, R.S.O. 1980, c. 145, s. 33.

<sup>141</sup> *Supra* note 61, at 633 (W.L.R.), 352 (All E.R.).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Supra* note 61.

turned the original order. Concluding that section 45(1) of the *Supreme Court of Judicature (Consolidation) Act 1925*<sup>145</sup> included a power to make ancillary orders to ensure the effectiveness of a *Mareva* injunction, the Court held that the plaintiff should have applied for the cross-examination of the defendant on his earlier affidavit or for the withdrawal of the order obtained without full disclosure.<sup>146</sup> Given these alternatives open to the plaintiff, the Court was of the opinion that it was not proper to introduce new machinery unnecessary for the proper operation of the *Mareva* jurisdiction.<sup>147</sup>

### 3. Power to Vary

In the last few years, the courts in England have acknowledged that, in appropriate circumstances, a *Mareva* injunction may be varied. This may be necessary, for example, "to allow a transfer of assets by the defendant if the defendant satisfies the court that he requires the money for a purpose which does not conflict with the policy underlying the *Mareva* jurisdiction,"<sup>148</sup> as was the case in *Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A.*<sup>149</sup>

### 4. *Mareva* Injunction and Costs

The English courts to date have considered two costs related issues arising out of their *Mareva* injunction jurisdiction. There has been some discussion whether the value of the assets frozen by a *Mareva* injunction should reflect any costs that are likely to be awarded to the plaintiff if he succeeds in his action against the defendant. In addition, the courts in recent cases have dealt with the question whether a plaintiff applying for *Mareva* injunction relief should be required to provide an undertaking with respect to the costs incurred by a person, other than the defendant, bound by the injunction.

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<sup>145</sup> 15 & 16 Geo. V, c. 49, s. 45(1).

<sup>146</sup> *Supra* note 61, at 618-19, *per* Ackner L.J.

<sup>147</sup> The Court in this case was badly divided. There was general agreement that the courts had an inherent jurisdiction under s. 45 to make an order for discovery to ensure the efficacy of a *Mareva* injunction. Ackner L.J. was of the view that, in the circumstances, the plaintiff could not obtain discovery of the defendant under the Rules of the Supreme Court. Nor could a court require the defendant to submit an affidavit of his assets for the purposes of effectuating a *Mareva* injunction (at 613-14).

Griffiths L.J. also concluded that the Rules of the Supreme Court did not empower the court to make the order in question. But, in his opinion, s. 45 did support an order requiring the defendant to file an affidavit of his assets (at 624).

Stephenson L.J. agreed that the Rules of the Supreme Court did not assist the plaintiff in this case. His Lordship, seemed to suggest that the power to grant discovery in aid of a *Mareva* injunction was based on the inherent jurisdiction of the courts (at 626). This position was rejected by Ackner L.J. (at 617), and Griffiths L.J. expressed no view on it. Stephenson L.J., however, concluded that the order of the judge at first instance went beyond the legitimate purposes of an order for discovery in aid of a *Mareva* injunction (at 628).

<sup>148</sup> See *A. v. C. (No. 2)*, *supra* note 61, at 635 (W.L.R.), 127 (All E.R.).

<sup>149</sup> *Supra* note 61.

The first question was addressed briefly by Megarry V.C. in *Barclay-Johnson v. Yuill*.<sup>150</sup> The plaintiff in this case sought a *Mareva* injunction to protect her £2,000 claim against the defendant. The asset that the plaintiff sought to freeze was the defendant's bank account in the amount of £3,300. The Vice Chancellor, although he issued a *Mareva* injunction, did not think that it "would be right to continue the injunction against the whole of the £3,300"<sup>151</sup> in these circumstances. He did intimate, however, that the amount in the defendant's bank account sterilized by the *Mareva* injunction should be £2,000 and an allowance for "a reasonable sum for costs."<sup>152</sup> This position would seem to be entirely consistent with the principle underlying the *Mareva* injunction jurisdiction, to minimize "the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action,"<sup>153</sup> since costs may well form part of the judgment eventually secured by the plaintiff.

On the second issue, whether a person seeking *Mareva* injunction relief should be required to give an undertaking respecting the costs that might be incurred by a third party complying with such an injunction, the courts again have adopted a very practical approach. An example of this is the case of *Searose Ltd. v. Seatrain (U.K.) Ltd.*,<sup>154</sup> where a *Mareva* injunction in respect of the defendant's bank account was requested. Goff J. described the costs problem associated with the freezing of bank accounts in the following terms:

... as *Mareva* injunctions have come to be granted more frequently, the banks in this country have received numerous notices of injunctions which have been granted. Sometimes the injunction identifies the bank account in question; sometimes it identifies the branch of a bank at which the defendant is said to have a bank account; sometimes it identifies the bank and no more; sometimes it does not even identify the bank. Now, where the particular account is identified I do not think the bank can reasonably complain. Every citizen of this country who receives notice of an injunction granted by the court will risk proceedings for contempt of court if he acts inconsistently with the injunction; and the bank, like any other citizen, must avoid any such action. But where the particular account is not identified the situation is somewhat different. I do not think it is right that the bank should incur expense in ascertaining whether the alleged account exists, without being reimbursed by the plaintiff for any reasonable costs incurred. Banks are not debt-collecting agencies; they are simply, in this context, citizens who are anxious not to contravene an order made by the court, an order which has been obtained on the application of, and for the benefit of, the plaintiff. Even where the particular branch of the bank is identified, some expense is likely to be incurred in ascertaining whether the defendant has an account at the branch. But where the branch is not identified the bank will be put in a very difficult position. It is, I think, well known that Barclays Bank has over 3,000 branches in this country, and Lloyds Bank has over 2,000 branches. Are they to circulate all their branches? If they did so, it would involve them in great ex-

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<sup>150</sup> *Supra* note 61.

<sup>151</sup> *Id.* at 1267 (W.L.R.), 196 (All E.R.).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 1264 (W.L.R.), 194 (All E.R.).

<sup>154</sup> *Supra* note 61. See also *Clipper Maritime Co. v. Mineralimportexport*, [1981], 1 W.L.R. 1262 (Q.B.).

pense; moreover such an exercise cannot, in ordinary circumstances, reasonably be expected of them.<sup>155</sup>

The solution proposed by his Lordship to this problem was to allow "a bank to whom notice of an injunction is given . . . before taking steps to ascertain whether the defendant has an account at any particular branch, [to] obtain an undertaking from the plaintiff's solicitors to pay their reasonable costs incurred in so doing."<sup>156</sup> The benefits of this solution, Goff J. stated, would be that "[t]he bank will then be protected; moreover the plaintiff's solicitors will no doubt be encouraged to limit their inquiry to a particular branch, or to certain particular branches."<sup>157</sup> For purposes of clarification, Mr. Justice Goff added that the undertaking under discussion would be for the protection of persons "other than the defendant himself."<sup>158</sup>

On a cautionary note, Goff J. referred to the courts' need to protect the interests, not only of the party applying for a *Mareva* injunction, but also of the defendant and third parties:

... care must be taken to ensure that such injunctions are only given for the purpose for which they are intended, viz. to prevent the possible abuse of the defendant removing assets in order to prevent the satisfaction of a judgment in pending proceedings; and likewise care must be taken to ensure that such injunctions do not bear harshly on innocent third parties. If these principles are not observed, a weapon which was forged to prevent abuse may become an instrument of oppression.<sup>159</sup>

To ensure that these competing interests are properly balanced, his Lordship enunciated the following principles:

It follows that, first, an order for a *Mareva* injunction should not be sought in terms wider than are reasonably required in the circumstances of the case. Second, any asset in respect of which an order for *Mareva* injunction is sought should be identified with as much precision as is reasonably practicable. Third, as regards any asset to which the order applies but which has not been identified with precision in the form of order proposed (eg money held in an unidentified bank account), the plaintiff may be required to give an undertaking to pay reasonable costs incurred by any person (other than the defendant) to whom notice of the terms of the injunction is given in ascertaining whether or not any asset to which the order applies, but which has not been identified in it, is within his possession or control.<sup>160</sup>

#### IV. THE *MAREVA* INJUNCTION: THE COMMONWEALTH EXPERIENCE

##### A. *The Canadian Cases*

After a somewhat rocky start in Canada, the *Mareva* injunction seems to have taken root in this country. There would still appear to be some uncertainty, however, about this remedy on the part of a few courts, and

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<sup>155</sup> *Id.* at 807.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 808.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

this uncertainty is evident in the case law. Canadian courts, on the whole, seem somewhat reluctant to give this significant prejudgment remedy the scope that it has been given by courts in other jurisdictions, particularly in the United Kingdom. This section of the paper will examine the decisions of the Canadian courts and point out the courts' ambivalence about arming claimants with what is clearly a highly potent weapon.

The first Ontario case to advert to the *Mareva* injunction question was *Robert Reiser & Co. v. Nadore Food Processing Equipment Ltd.*<sup>161</sup> There Mr. Justice Steele, without relying on the trilogy of English cases that gave birth to the *Mareva* injunction, granted the application of the plaintiff to continue until trial an *ex parte* injunction restraining the defendants from disposing of certain property.

In *Robert Reiser*, the plaintiff's action was for money owing by the defendant as the maker of two promissory notes held by the plaintiff. In addition, the plaintiff sought to set aside a conveyance of property by the defendant to a third party, a related company. Steele J., citing the old case of *Campbell v. Campbell*<sup>162</sup> and the more recent decision of *City of Toronto v. McIntosh*,<sup>163</sup> concluded that an injunction, like the one sought by the plaintiff, could be granted if the court is satisfied "that there is a strong indication that the conveyance may have been fraudulent."<sup>164</sup> A "conviction or prior finding of fraud"<sup>165</sup> was not necessary in order to come within the principles enunciated by the Court in *Campbell v. Campbell*.

Two other aspects of this decision are significant. First, in determining whether to grant the injunction requested in the case before him, Steele J. applied the principles for the granting of an interlocutory injunction outlined by the Divisional Court in *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.*<sup>166</sup> There the Court accepted the principles pronounced by the House of Lords in the seminal case of *American Cyanamid Co. v. Ethicon, Ltd.*<sup>167</sup> In other words, in this respect an injunction to restrain a defendant from disposing of his assets before trial is to be treated like any other in-

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<sup>161</sup> (1977), 17 O.R. (2d) 717, 81 D.L.R. (3d) 278, 25 C.B.R. (N.S.) 162 (H.C.J.).

<sup>162</sup> (1881), 29 Gr. 252.

<sup>163</sup> (1977), 16 O.R. (2d) 257 (H.C.J.).

<sup>164</sup> *Supra* note 161, at 719 (O.R.), 280 (D.L.R.), 165 (C.B.R.). For some early cases concerning this particular jurisdiction, see e.g., *Fairchild v. Elmsie* (1909), 2 Alta. L.R. 115 (S.C.); *Pacific Investment Co. v. Swan* (1898), 3 Terr. L.R. 125 (C.A.); *Bank of Montreal v. Pelletier* (1923), 19 Alta. L.R. 756, [1923] 3 W.W.R. 735, [1923] 4 D.L.R. 706 (C.A.); *Winnipeg Paint & Glass Co. v. Lackman*, [1923] 3 W.W.R. 361 (Man. K.B.); *Albertson v. Secord* (1912), 4 Alta. L.R. 90, 1 W.W.R. 657, 1 D.L.R. 804 (C.A.); *Clinton v. Sellars* (1907), 1 Alta. L.R. 129, 6 W.L.R. 788 (S.C.); *Toronto Carpet Co. v. Wright* (1912), 22 Man. R. 294, 21 W.L.R. 304, 3 D.L.R. 725 (K.B.); *Bassi v. Sullivan* (1914), 32 O.L.R. 14, 18 D.L.R. 452 (H.C. Div.).

<sup>165</sup> *Id.*

<sup>166</sup> (1977), 17 O.R. (2d) 505 at 510-12, 80 D.L.R. (3d) 725 at 730-32, 35 C.P.R. (2d) 273 at 279-80.

<sup>167</sup> [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504 (H.L.). See Sharpe, *supra* note 95.

junction.<sup>168</sup> Second, it is interesting to note that Mr. Justice Steele amended the terms of the *ex parte* injunction granted by Van Camp J. to permit the property or goods in question to be sold in the "normal course of business."<sup>169</sup> "[P]roceeds from any such sale," he ordered, "must be held in a special trust account to the credit of this action."<sup>170</sup> It will be recalled that the English Court of Appeal in *Iraqi Ministry of Defence v. Arcepey Shipping Co. SA*<sup>171</sup> came to a similar conclusion. In *Arcepey*, a *Mareva* injunction had been granted.

The first setback that the *Mareva* injunction jurisdiction suffered in this country was in the case of *OSF Ind. Ltd. v. Marc-Jay Inv. Ltd.*<sup>172</sup> In that case, Lerner J. denied the plaintiff's *ex parte* application for an injunction to enjoin the defendant from removing its assets from Ontario pending the determination of the action on the ground that there was no basis in law for the remedy sought. The plaintiff's application in the *OSF Ind.* case would seem to have been a purely prophylactic measure; in other words, it does not appear that the defendant had entered into any questionable transactions of its property. The plaintiff's concern, as stated by Mr. Justice Lerner, was

... that in the event that the defendant [a non-resident corporation not carrying on business in Ontario] receives notice of this action, ... it may remove its assets out of Ontario pending the determination of the action and that there may be no assets with which to satisfy any judgment which the plaintiff may obtain.<sup>173</sup>

In dismissing the plaintiff's application, Lerner J. stated that a creditor, before he has secured a judgment against his debtor, "has no right at law or in equity capable of being protected by an interlocutory injunction."<sup>174</sup> It would appear that his Lordship believed that he was bound by the decision of the Ontario Court of Appeal in *Bedell v. Gefaell (No. 2)*<sup>175</sup> where a similar request for injunctive relief also was turned down. The judgment of Lerner J. makes only a passing reference to the *Karageorgis* case and it would appear that counsel for the plaintiff did not cite to his Lordship the other English

<sup>168</sup> There would appear to be some difference of opinion on whether the proper test to be applied in the *Mareva* context is that enunciated by the House of Lords in the *American Cyanamid* case. For example, Tallis J. in *B.P. Exploration Co. (Libya) Ltd. v. Hunt*, [1981] 1 W.W.R. 209 at 240, (1980), 114 D.L.R. (3d) at 58, 16 C.P.C. 168 at 181 (N.W.T.S.C.) also referred to this test. Grange J. in *Canadian Pacific Airlines Ltd. v. Hind* (1981), 32 O.R. (2d) 591 at 596, 122 D.L.R. (3d) 498 at 503 (H.C.J.) rejected it commenting:

The adoption of the *Mareva* principle can lead to some sorry abuse. I would hate to see a defendant's assets tied up merely because he was involved in litigation. I do not think the *American Cyanamid* injunction rule [with its emphasis on the balance of convenience and with its relegation of a merits test to a subsidiary role] can possibly apply. There must be a very strong case and a real danger of disposition of the only assets which will satisfy the judgment.

<sup>169</sup> *Supra* note 161, at 720 (O.R.), 282 (D.L.R.), 166 (C.B.R.).

<sup>170</sup> *Id.*

<sup>171</sup> *Supra* note 61.

<sup>172</sup> (1978), 20 O.R. (2d) 566, 88 D.L.R. (3d) 446, 7 C.P.C. 57 (H.C.J.).

<sup>173</sup> *Id.* at 567 (O.R.), 446 (D.L.R.), 58 (C.P.C.).

<sup>174</sup> *Id.* at 568 (O.R.), 448 (D.L.R.), 60 (C.P.C.).

<sup>175</sup> [1938] O.R. 726, [1938] 4 D.L.R. 443 (C.A.).

decisions affirming the power of the courts to grant a *Mareva* injunction in appropriate circumstances. With the exception of some minor judicial rumblings, the issue of whether Canadian courts could grant a *Mareva* injunction remained dormant for another two years.

In 1979, Eberle J. in *Provincial Bank of Canada v. Supreme Seat Dist. Ltd.*<sup>176</sup> without citing any authority, did agree to continue an injunction restraining the defendant company from dealing with a large sum of money on deposit in its bank account. The monies were realized on the sale of certain shares of the defendant company that were covered by a security agreement in favour of the plaintiff bank. Mr. Justice Eberle described the actions of the defendant company in the following unflattering terms:

What happened . . . was that, while the company was writing cheques against its account at the plaintiff bank, an account which was in overdraft, money collected by the company [in breach of the security agreement] was being deposited in an account in the Canadian Imperial Bank of Commerce. This at the very best was a low degree of commercial morality. Ordinary business relations, including the borrowing and lending of money, depend to a great extent on the honesty of the parties involved, and it appears on the material before me that such honesty on the part of the defendants is lacking.<sup>177</sup>

The defendant company had acted suspiciously in a number of other ways as well, including vacating the premises it occupied, moving its assets to another location and moving its head office. In response to the defendant's argument that the injunction, if continued, would create a hardship for the defendant company, possibly resulting in bankruptcy and unemployment for its employees, Mr. Justice Eberle simply stated that although the "freeze" on its account would undoubtedly be a hardship, the case was nevertheless a proper one for an injunction.<sup>178</sup>

The judgment of Eberle J. in *Supreme Seat* should be contrasted with the judgment of Hamilton J. in *Hawes v. Szewczyk*,<sup>179</sup> a Manitoba case decided at approximately the same time. There the plaintiffs were seeking an injunction to prevent the defendant from "selling, disposing, mortgaging, or encumbering in any manner, any property and/or assets [in] which he has a legal or equitable interest or to which he is entitled, pending the conclusion of this case."<sup>180</sup> The plaintiffs argued that the issue of liability was clear and that an eventual judgment would be substantial. Hamilton J. denied the plaintiffs' request on the ground that the Court had no jurisdiction in the circumstances of the case to grant the relief sought by them. He observed that, in his opinion, the course of action advocated by the plaintiffs "would be a dangerous innovation, and even if technically within the jurisdiction of the court, one that should not be exercised."<sup>181</sup> He went on to state that to grant an injunction in a case other than one in which the plaintiff had

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<sup>176</sup> Unreported, July 30, 1979 (Ont. H.C.J.).

<sup>177</sup> *Id.* at 2.

<sup>178</sup> *Id.* at 3.

<sup>179</sup> Unreported, April 18, 1979 (Man. Q.B.).

<sup>180</sup> *Id.* at 1.

<sup>181</sup> *Id.* at 5-6.

"established his or her claim by due process of law"<sup>182</sup> would be unjust and, therefore, contrary to the spirit and intent of *The Queen's Bench Act*,<sup>183</sup> the equivalent to section 19(1) of the Ontario *Judicature Act*<sup>184</sup> and section 45(1) of the English *Supreme Court of Judicature (Consolidation) Act, 1925*,<sup>185</sup> Hamilton J., however, seemed to leave open the possibility of an injunction being granted under section 59(3) of *The Queen's Bench Act* in a case where it could be shown that the defendant was about to remove his property from the province or to deal with it with the intent to delay, defeat or defraud creditors.<sup>186</sup> Section 59(3) is equivalent to that part of section 19(1) of the Ontario *Judicature Act* concerned with the use of an injunction "to prevent any threatened or apprehended waste or trespass."

Although the issue is far from being resolved in an entirely satisfactory manner, with favourable decisions in Ontario, the Northwest Territories and in the Federal Court of Canada, it would seem that *Mareva* injunctions may be granted in this country in certain circumstances. Considering first the narrowest interpretation of this recent spate of decisions, it may be argued, for example, that the power of the courts to grant prejudgment injunctive relief to restrain the defendant from dealing with his assets is limited to cases involving fraud or a fraudulent conveyance. *Mills and Mills v. Petrovic*<sup>187</sup> and *Canadian Pacific Airlines Ltd. v. Hind*,<sup>188</sup> both decisions of a judge of the Ontario High Court of Justice, fall into the fraud category. The cases of *Canadian Imperial Bank of Commerce v. Nielsen*<sup>189</sup> and *Bank of Montreal v. Page Properties Ltd.*<sup>190</sup> are of the fraudulent conveyance variety. The decision of the Federal Court of Canada can be dismissed because the views of Collier J. on the availability of a *Mareva* injunction were *obiter*: Mr. Justice Collier declined to accept jurisdiction in *Elesguero Inc. v. Ssangyong Shipping Co.*<sup>191</sup> on the ground of *forum non conveniens*.

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<sup>182</sup> *Id.* at 6.

<sup>183</sup> R.S.M. 1970, c. C280.

<sup>184</sup> R.S.O. 1980, c. 223.

<sup>185</sup> 15 & 16 Geo. V, c. 49.

<sup>186</sup> 59(3) Where, either before, or at, or after, the hearing of any cause or matter, an application is made for an injunction to prevent any threatened or apprehended waste or trespass, the injunction may be granted, if the court thinks fit, whether the person against whom the injunction is sought is, or is not, in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

<sup>187</sup> (1980), 30 O.R. (2d) 238, 118 D.L.R. (3d) 367.

<sup>188</sup> *Supra* note 168.

<sup>189</sup> Unreported, Apr. 2, 1981 (Ont. H.C.J.). See also *Canpotex Ltd. v. Graham*, unreported Feb. 5, 1982 (Ont. H.C.J.).

<sup>190</sup> (1980), 15 R.P.R. 108 (Ont. H.C.J.), rev'd (1981), 32 O.R. (2d) 9 (Div. Ct.). See also *C.D.N. Research and Development Ltd. v. Bank of Nova Scotia* (1981), 32 O.R. (2d) 579, 122 D.L.R. (3d) 485 (H.C.J.). Leave to appeal to the Ont. Div. Ct. has been granted.

<sup>191</sup> (1980), 117 D.L.R. (3d) 105 (F.C.T.D.).



Unfortunately, this "worst case scenario" does not take account of the decisions of Montgomery J. in *Liberty National Bank and Trust Co. v. Atkin*,<sup>192</sup> and of Tallis J. of the Northwest Territories Supreme Court in *B.P. Exploration Co. (Libya) Ltd. v. Hunt*.<sup>193</sup> In *Atkin*, the plaintiff sought to restrain the defendants from dealing with a certain term deposit held by a local trust company. The monies in the term deposit were totally unconnected with the action brought by the plaintiff. The basis for the claim for a *Mareva* injunction was certain evidence that led "to the inescapable conclusion that a systematic liquidation of assets is being made for other than business purposes."<sup>194</sup>

Mr. Justice Montgomery, in granting the plaintiff's application for injunctive relief, reviewed the more important English decisions concerned with the jurisdiction to issue a *Mareva* injunction. Nowhere in his judgment are the words "fraud" or "fraudulent conveyance" mentioned. His concluding remarks should leave little doubt about Mr. Justice Montgomery's attraction to the *Mareva* injunction.

In my view, the winds of change cry out for the new equitable remedy that *Mareva* provides. I adopt the test laid down by the Master of the Rolls in *Third Chandris Shipping*. I also adopt the proposition in *Prince Abdul Rahman* that, if there is a danger of the defendant absconding or of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that if the plaintiff obtains judgment he may not be able to have it satisfied, an injunction should issue if the safeguards in the test in *Third Chandris Shipping* are met.

I cannot believe that the equitable jurisdiction of this Court should be any less than that of the English Court. The statute affording jurisdiction is practically the same. The size of Ontario and the complexity of its geography invite the remedy. In my view, the doctrine should not be restricted to the threat of removal of assets from Ontario.<sup>195</sup>

Also of interest in this case is the fact that the injunction granted was for \$80,000; that is, \$80,000 of the \$155,000 term deposit in question was required to be held until trial or other disposition of the action "to cover claim and costs."<sup>196</sup> The amount in dispute was only \$75,000. Mr. Justice Montgomery also observed that, insofar as prejudgment interest was concerned, "[a]ny interest that the Court may see fit to award . . . should be sufficiently protected by the interest yield on the \$80,000 held by Canada Trust."<sup>197</sup>

Equally as significant as the judgment of Montgomery J. in *Liberty National Bank and Trust Company v. Atkin*, is the decision of Tallis J. in *B.P. Exploration Company (Libya) Ltd. v. Hunt*, a case involving a series of attempts to enforce a foreign judgment. What is worth pointing out, how-

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<sup>192</sup> (1981), 31 O.R. (2d) 715 (H.C.).

<sup>193</sup> *Supra* note 168.

<sup>194</sup> *Supra* note 192, at 717.

<sup>195</sup> *Id.* at 723.

<sup>196</sup> *Id.* at 724 [Emphasis added].

<sup>197</sup> *Id.*

ever, is that this litigation has given birth to a number of *Mareva* injunction applications, including the one under discussion.<sup>198</sup>

The submissions of the defendant in *B.P. Exploration Company (Libya) Ltd. v. Hunt* were straightforward: that *Mareva* injunction remedies were not consistent with the law of the North West Territories, and that the facts did not warrant a *Mareva* injunction, even if it were available as a remedy.<sup>199</sup> After a lengthy review of the Canadian and English authorities on point, Tallis J. concluded that the Court did have "jurisdiction to issue a *Mareva* type injunction."<sup>200</sup> In so holding, his Lordship rejected the defendant's contention that a *Mareva* injunction was inconsistent with the rules of court dealing with absconding debtors. He stated the opinion that "such provisions do not deprive this court of granting a *Mareva* type injunction."<sup>201</sup>

In dealing with the defendant's submission that a *Mareva* injunction should not have been granted in the circumstances of the case, Tallis J., as did Montgomery J. in the *Atkin* case, referred to the guidelines enunciated by Lord Denning M.R. in *Third Chandris Shipping Corp. v. Unimarine SA*, and found these guidelines to be satisfied. Yet, on the material before him, the only real evidence establishing a risk of assets being removed before the judgment was satisfied was the following: the defendant had "the means and capability to organize his business affairs in a sophisticated manner so as to prevent his assets being available to satisfy a judgment;"<sup>202</sup> the defendant gave no indication "as to his future intentions which would allay the fears of the Plaintiff that he would alienate his assets,"<sup>203</sup> nor did he proffer any undertaking or security; the defendant, in each jurisdiction in which a *Mareva* injunction was granted, took action "to set it aside rather than leave matters in the *status quo* pending the hearing of an appeal in the English Court of Appeal";<sup>204</sup> and the defendant "made considerable efforts to evade service"<sup>205</sup> in respect of the proceedings in England.

#### B. *The Mareva Injunction in Other Commonwealth Jurisdictions*

The *Mareva* injunction has been employed more extensively in other Commonwealth jurisdictions. The focus of the present discussion will be on the response of the courts in Australia and New Zealand to this innovative prejudgment remedy.

Those few cases in which the *Mareva* injunction jurisdiction has been

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<sup>198</sup> See, for example, *Ex parte B.P. Exploration Co. (Libya) Ltd., Re Hunt*, [1979] 2 N.S.W.L.R. 406 (S.C.) and *Hunt v. B.P. Exploration Company (Libya) Ltd.*, [1980] 1 N.Z.L.R. 104 (S.C.), both of which are discussed in Part IV, s. B, *infra*.

<sup>199</sup> *Supra* note 168, at 214 (W.W.R.), 39 (D.L.R.), 173 (C.P.C.).

<sup>200</sup> *Id.* at 241 (W.W.R.), 58 (D.L.R.), 182 (C.P.C.).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 220 (W.W.R.), 43 (D.L.R.).

<sup>203</sup> *Id.* at 221 (W.W.R.), 43 (D.L.R.).

<sup>204</sup> *Id.* at 221 (W.W.R.), 44 (D.L.R.).

<sup>205</sup> *Id.*

rejected will be dealt with first. In *Pivovarov v. Chernabaeff*,<sup>206</sup> the South Australian Supreme Court dismissed the plaintiff's application for an injunction to restrain the defendant, an American resident in Australia, from disposing of his property before the conclusion of the action. As grounds for a *Mareva* injunction, the plaintiff pointed to the fact that the defendant's property was up for sale, and that he was seeking payment in cash. Bray C.J. decided the case on the narrow ground that, since the defendant was resident in the jurisdiction, a *Mareva* injunction could not be granted. As has already been pointed out, however, the English courts in more recent cases have concluded that such an injunction may be granted even though the defendant is resident in the United Kingdom.<sup>207</sup>

Although he dismissed the plaintiff's request on the narrow grounds mentioned above, Bray C.J. went on to give his views on the propriety of the courts' assuming the jurisdiction to grant a *Mareva* injunction. It was his view that the introduction of *Mareva* injunctions was properly a matter for the legislature rather than the courts,<sup>208</sup> and he buttressed this argument by pointing to the legislation permitting a court to order the arrest of an absconding debtor.<sup>209</sup> This same argument, it will be recalled, was raised by the defendant in *B.P. Exploration Company (Libya) Ltd. v. Hunt*, and rejected summarily by Tallis J.<sup>210</sup>

Courts in the Australian states of New South Wales, Victoria and Western Australia and in New Zealand, on the other hand, have expressed their approval of *Mareva* injunctions. In *Praznovsky v. Sablyack*,<sup>211</sup> the plaintiffs claimed to be entitled to damages from the defendant on the basis of her participation in a conspiracy to steal their jewellery and money. The Supreme Court of Victoria concluded that the plaintiffs, having established a *prima facie* case against the defendant, were entitled to prejudgment relief in the form of a *Mareva* injunction: they ran an "appreciable risk that the defendant, if not restrained, may disappear with the proceeds of sale before her trial and that plaintiffs' action against her will prove fruitless."<sup>212</sup>

In *J.D. Barry Pty. Ltd. v. M. & E. Constructions Pty. Ltd.*,<sup>213</sup> Lush J. of the Supreme Court of Victoria denied the plaintiff's motion for a *Mareva* injunction, however, without doubting the jurisdiction of the Court in appropriate circumstances to grant such relief. Lush J. concluded that, on the material before him, the plaintiff had failed to establish a *prima facie* case.<sup>214</sup>

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<sup>206</sup> (1978), 16 S.A.S.R. 329.

<sup>207</sup> See discussion Part III, s. B, *supra*.

<sup>208</sup> *Supra* note 206, at 338.

<sup>209</sup> *Id.* at 340.

<sup>210</sup> See also *Sanko Steamship Co. Ltd. v. D.C. Commodities (A'asia) Pty. Ltd.*, [1980] W.A.R. 51 (S.C.).

<sup>211</sup> [1977] V.R. 114 (S.C.).

<sup>212</sup> *Id.* at 120.

<sup>213</sup> [1978] V.R. 185.

<sup>214</sup> *Id.* at 189.

Moreover, his Lordship was not satisfied that there was reason to believe that the defendant could not or would not pay its debt if judgment went against it. In this regard, Lush J. commented:

... the danger felt is that if this money comes into the hands of the first defendant it will simply disappear in the expenses and perhaps even the losses of conducting the first defendant's business. In my opinion this is an entirely different situation from the situations dealt with in the three cases to which I have referred. They in fact all dealt with a threat to remove money from the jurisdiction or with the fear that money might be removed from the jurisdiction. It is neither necessary nor desirable for me to express in this case any opinion whether the rule is limited to the removal of money from the jurisdiction. Be that as it may, all three cases were concerned with a fear that something might be done which could be described as disposing of assets with the effect of placing them out of the reach of the plaintiff. In my opinion the disappearance which the plaintiff fears in this case of the relevant money in the course of the first defendant's trade does not come within the concept of disposing of assets with the intention or with the effect of defeating a claim.<sup>215</sup>

Continuing along the same lines, he added:

If an injunction could be obtained in the present case it would either be entirely ineffective to benefit the plaintiff, because the money would stand held for the benefit of creditors generally, or the result would be that a plaintiff could require a defendant to set up a special fund to meet a debt not yet proved, or again the effect might be to give the particular plaintiff preference over other business creditors. No such use of the injunction in relevant circumstances has been pointed to and I am unable to take the view that it would be either just or convenient (*Supreme Court Act 1958*, s. 62(2)) to make the order sought by the plaintiff against the first defendant.<sup>216</sup>

These remarks of Lush J. are consistent with the position adopted by Goff J. in *Iraqi Ministry of Defence v. Arcepey Shipping Co. SA*.<sup>217</sup>

Grudging approval was given to the *Mareva* injunction jurisdiction by the New South Wales Supreme Court in two recent cases: *Balfour Williamson (Australia) Pty. Ltd. v. Douterluinge*<sup>218</sup> and *Ex parte B.P. Exploration Co. (Libya) Ltd.; Re Hunt*.<sup>219</sup> In the former, Sheppard J. in a brief judgment stated that he was bound by the decisions of the English Court of Appeal.<sup>220</sup> The plaintiff, having shown that there was a real danger that the defendant would abscond from the jurisdiction and could take whatever assets he may have with him, was entitled to a *Mareva* injunction. This case is but another example of a *Mareva* injunction being granted against a resident defendant.

Powell J., although he too believed he was bound by the decisions of the English Court of Appeal respecting *Mareva* injunctions, expressed doubts about the appropriateness of assuming such a jurisdiction in *Ex parte B.P.*

<sup>215</sup> *Id.* at 188.

<sup>216</sup> *Id.*

<sup>217</sup> *Supra* note 61.

<sup>218</sup> [1979] 2 N.S.W.L.R. 884.

<sup>219</sup> *Supra* note 198.

<sup>220</sup> *Supra* note 217, at 886.

*Exploration Co. (Libya) Ltd.; Re Hunt*.<sup>221</sup> He stated that he found the reasoning of Bray C.J. in *Pivovarovoff v. Chernabaeff* more compelling than that found in either *Praznovsky v. Sablyack* or the Western Australian case of *Sanko Steamship Co. Ltd. v. D.C. Commodities (A'asia) Pty. Ltd.*<sup>222</sup> He also questioned the legitimacy of the courts to grant the type of relief in question:

So to do would, in my view, fly in the face of the intention of the legislature, expressed in s. 16(3) (c) of the *Supreme Court Act*, that, as from the passing of the Act even the limited form of relief provided by the former "writ of foreign attachment" should not be available to the plaintiff in such a case.<sup>223</sup>

In any event, Powell J. concluded that the conditions for a *Mareva* injunction were not satisfied in this case. The bases for his holding were as follows: (1) the evidence did not "support the view that he [the defendant] is about to remove his assets from the jurisdiction";<sup>224</sup> (2) the amount which could be realized upon the disposition of the assets paled "into insignificance beside the amount of the judgment";<sup>225</sup> (3) the assets were charged in favour of a third party who could realize on the assets unimpeded by any injunction;<sup>226</sup> and (4) since the defendant was beyond the jurisdiction, "if he chose to ignore it [the injunction], and chose to remain outside the jurisdiction, it could not . . . be enforced, so that the whole proceeding would be an exercise in futility."<sup>227</sup>

The Supreme Court of Western Australia put its *imprimatur* on the *Mareva* injunction in the case of *Sanko Steamship Co. v. D.C. Commodities (A'asia) Pty. Ltd.*<sup>228</sup> Lavan S.J.P. held that, "having regard to the share structure of the defendant and its conduct to date it would be unwise to rely on the statement made by the company that it has no intention of evading the consequences of any judgment which may be given against it."<sup>229</sup> An injunction was, in the circumstances, justified. It is interesting to note that Lavan S.J.P. found in the plaintiff's favour despite the arguments of the defendant that "[t]he continuation of the injunction could prevent the defendant from fulfilling its contractual commitment and as well as depriving it of a substantial profit would render it liable to an action for damages as well as affecting adversely its commercial reputation."<sup>230</sup>

The last case to be examined in this section is the decision of the New

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<sup>221</sup> *Supra* note 198, at 410.

<sup>222</sup> *Id.* at 411.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 407.

<sup>228</sup> *Supra* note 210.

<sup>229</sup> *Id.* at 56.

<sup>230</sup> *Id.* at 53.

Zealand Supreme Court in *Hunt v. B.P. Exploration Co. (Libya) Ltd.*,<sup>231</sup> yet another skirmish in the litigious war being fought by these two parties. As has already been pointed out, Tallis J. in the Northwest Territories Supreme Court, granted a *Mareva* injunction in the Canadian version of this litigation, while the New South Wales Supreme Court refused to grant such relief on substantially the same facts. Barker J. in the New Zealand Court, reviewed the English and Australian authorities, and concluded as follows:

On the one hand, is the *Mareva* jurisdiction...merely an instance of the exercise of the Court's general jurisdiction conferred in broad terms by s. 16; or is the *Mareva* jurisdiction to be regarded as legislating in an area which should be left to Parliament?...

I consider that this Court does have a *Mareva* jurisdiction. I do not accept the view that this jurisdiction is in the nature of legislating in an area forbidden to the Courts. I am not impressed by the 'assumption of fearful authority' line of cases. There appears to have been an old English procedure of 'foreign attachment' which provides a perfectly respectable ancestry for the procedure. The fact that this procedure accords with that in European countries is, for a New Zealand Court, a matter of coincidence.

The Court has to approach modern problems with the flexibility of modern business. In former times, as Lawton L.J. pointed out, it would have been more difficult for a foreign debtor to take his assets out of the country. Today, vast sums of money can be transferred from one country to another in a matter of seconds as a result of a phone call or a telex message. Reputable foreign debtors of course have nothing to fear; the facts of the reported *Mareva* cases indicate that the jurisdiction is wholesome; the sheer number of *Mareva* injunctions granted in London indicates that the jurisdiction is fulfilling a need.<sup>232</sup>

On the basis of the evidence before him, Barker J. was satisfied that he should sustain the *Mareva* injunction outstanding against Hunt. It seems that his Lordship was particularly impressed by the failure of the defendant to indicate his willingness to pay if his efforts to defeat the plaintiff's claim were unsuccessful. An additional factor that seems to have weighed heavily against Hunt was the fact that the plaintiff had "a judgment, albeit one subject to appeal."<sup>233</sup> Finally, Barker J. considered as a factor in the plaintiff's favour, that the injunction originally granted had been varied "to permit the proper operation of the farm [presumably, owned by Hunt] with a minimum of inconvenience."<sup>234</sup> Consequently, there was "little lasting detriment being suffered by Mr. Hunt because of the *Mareva* injunction."<sup>235</sup>

## V. SUMMARY

Part II of this paper described the proposals of the Civil Procedure Revision Committee with respect to five different prejudgment remedies.

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<sup>231</sup> *Supra* note 198. The judgment of Barker J. refers to two earlier cases in which it was held that the New Zealand Supreme Court enjoyed a *Mareva* injunction jurisdiction: see *Mosen v. Donselaar* (A 325/75, Wellington Registry, judgment 13 October 1978) and *Systems & Programs (N.Z.) Ltd. v. P.R.C. Public Mngt. Services Inc.*, [1978] N.Z. Recent Law 264.

<sup>232</sup> *Id.* at 117-18.

<sup>233</sup> *Id.* at 120.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

Looking at the provisions concerned with certificates of pending litigation, orders for preservation of personal property, orders for interim recovery of personal property, orders setting aside default judgments upon terms and orders for security for costs, one would be hard pressed to determine why the Committee's Report was five years in the making. The relevant sections of the proposed new *Judicature Act* and pertinent rules of the proposed Rules are little more than a rehash of the present statutory and procedural provisions. Unfortunately, the Committee in these prejudgment relief areas did not even find it advisable, for the most part, to codify the case law. While it is obvious that the Committee has sought to employ "simple language and terminology"<sup>236</sup> in the new Act and accompanying Rules of Civil Procedure, there does not appear to be any evidence of any attempt to balance "the expense to litigants of the prescribed procedures against convenience efficiency and social purpose"<sup>237</sup> insofar as the above-mentioned prejudgment remedies are concerned. How else does one explain the maintenance of a distinction between real property and personal property in the recommendations of the Committee? Is there really a need to have separate provisions concerned with the prejudgment attachment of real property<sup>238</sup> and the prejudgment attachment of personal property by means of a preservation order,<sup>239</sup> or an order for interim recovery of personal property?<sup>240</sup>

The failure to rationalize the five prejudgment remedies discussed in Part II is evident in other ways as well. The proposals of the Civil Procedure Revision Committee fail to adopt a consistent approach to a number of important issues in the area of prejudgment relief. For example, while section 50(4) of the proposed *Judicature Act*, respecting certificates of pending litigation, deals expressly with the rights of a person who has suffered damages as a result of the registration of a certificate or caution "without a reasonable claim to title to or interest in the land," the Rules concerned with the setting aside of a default judgment upon terms, and security for costs, are silent on the remedies, if any, available where these powers have been abused. Another significant gap in the prejudgment relief provisions advocated by the Committee is the failure to set out the onus of proof resting on a person seeking any one of the five remedies. Although some may contend that the Committee's silence on this issue is not a serious omission, the onus of proof is of critical importance to a proper balancing of the interests of debtors and creditors.

In contrast to the rather weak efforts of the Committee in the area of prejudgment remedies, in recent years the courts in England, Canada and other parts of the Commonwealth have created an effective, yet equitable, prejudgment remedy: the *Mareva* injunction. The courts, in granting this

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<sup>236</sup> Report, *supra* note 1, s. 1 at 2.

<sup>237</sup> *Id.*

<sup>238</sup> *Judicature Act*, R.S.O. 1980, c. 223, s. 50.

<sup>239</sup> Rule 35.02.

<sup>240</sup> Report, *supra* note 1, s. 51 and Rule 44.

relief, have been careful to consider the rights of debtors, creditors and third parties. In the few short years that the jurisdiction to grant a *Mareva* injunction has been recognized, the courts have addressed a wide variety of important issues, including the strength of the plaintiff's case necessary to support a *Mareva* injunction, the circumstances in which such relief should be available and the protection to be afforded to a defendant and interested third parties by means of undertakings given by the plaintiff, and by the courts' power to vary a *Mareva* injunction. As stated earlier, the *Mareva* injunction is not a panacea. Different considerations, for example, may apply to relief in the form of security for costs. Many of the questions tackled by the courts in the last six years in filling out the details of their *Mareva* injunction jurisdiction, however, are equally relevant to the remedies discussed in Part II, and should be addressed in the new *Judicature Act* and Rules of Civil Procedure.

One can only wonder why the Civil Procedure Revision Committee, in revising *The Judicature Act* and the Supreme Court of Ontario Rules of Practice, chose to ignore the *Mareva* injunction developments in the common law world. Given the controversy surrounding *Mareva* injunctions, it is surprising that the Committee decided to leave section 19(1) of the *Judicature Act*<sup>241</sup> basically unchanged. Section 45 of the proposed *Judicature Act* reads as follows:

45. The court may grant a mandamus or an injunction or appoint a receiver, by an interlocutory order, in all cases in which it appears to the court to be just or convenient so to do. Subject to the rules, any such order may be made either unconditionally or upon such terms and conditions as the court thinks just.

This course of action may be usefully contrasted with the reaction to the rise of the *Mareva* injunction in New Brunswick, England and Western Australia. In New Brunswick, for example, the following provision has been included in that Province's new rules of procedure:

40.01 A request for an interlocutory injunction or mandatory order, or for an extension thereof, may be made

- (a) before commencement of proceedings, by preliminary motion, and
- (b) after commencement of proceedings, by motion, but in the former case, the request may be granted only on terms providing for commencement of proceedings without delay.

40.02(1) Subject to section 34 of the *Judicature Act*, where a motion under Rule 40.01 is made without notice, an injunction may be granted for a period not exceeding 10 days.

(2) Subject to paragraph (3), a motion to extend an injunction may be made only on notice to all parties affected by the order sought.

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<sup>241</sup> R.S.O. 1980, c. 223. It should be noted that Ontario courts are given power under the *Family Law Reform Act*, R.S.O. 1980, c. 152, s. 22, to "make such interim or final order as it considers necessary for restraining the disposition or wasting of assets that would impair or defeat the claim or order for the payment of support." It is now questionable whether this power can be exercised by a provincial court (family division): see *Reference Re Section 6 of the Family Relations Act, 1978*, unreported, Jan. 26, 1982 (S.C.C.).



## (3) Where

- (a) a party evades service of a notice of motion to extend an injunction, or
- (b) service of a notice of motion to extend an injunction has not been effected on all parties and, because of exceptional circumstances, the injunction ought to be extended,

the court may extend the injunction, but each extension shall be limited to a period not exceeding an additional 30 days.

40.03(1) Where a person claims monetary relief, the court may grant an interlocutory injunction to restrain any person from disposing of, or removing from New Brunswick, assets within New Brunswick of the person against whom the claim is made.

(2) In considering whether to grant an injunction, the court shall take into account the nature and substance of the claim or defence, and consider whether there is a risk of the assets being disposed of or removed from New Brunswick.

(3) Notwithstanding Rule 40.02, an injunction may be granted under this subrule to remain in effect until judgment.

(4) Where an injunction has been granted under this subrule to remain in effect until judgment and the claimant succeeds on his claim for debt or damages, the injunction shall, without further order, continue in effect until the judgment is satisfied.

40.04 Unless ordered otherwise, on the granting of an interlocutory injunction or mandatory order, the plaintiff or applicant is deemed to have undertaken to abide by any order as to damages arising therefrom.

40.05 An injunction or mandatory order may be made under this rule either unconditionally or upon terms and conditions as may be just.<sup>242</sup>

In England, the Supreme Court Bill<sup>243</sup> before Parliament at the time this paper was prepared, if enacted, would expressly authorize the granting of *Mareva* type of relief.<sup>244</sup> In the *Working Paper on The Absconding Debtors Act 1877-1965*,<sup>245</sup> the Law Reform Commission of Western Australia, too, specifically discussed empowering the court to hold a hearing "to make an order restraining the respondent from removing or transferring his property from the State."<sup>246</sup> Sections 13 and 14 of the proposed *Absconding Debtors Act* would give effect to such a recommendation.<sup>247</sup>

<sup>242</sup> N.B. Reg. 81-174 (O.C. 81-878). Mr. Gertner is indebted to Professor Watson of Osgoode Hall Law School for bringing this procedural innovation to his attention.

<sup>243</sup> Supreme Court Bill 1980-81, cl. 37. The Bill is referred to in *A.J. Bekhor & Co. v. Bilton*, *supra* note 61.

<sup>244</sup> *Id.*, cl. 37.

<sup>245</sup> Law Reform Commission of Western Aust., *Working Paper on the Absconding Debtors Act 1877-1965* (Perth, 1980).

<sup>246</sup> *Id.* at 43-48.

<sup>247</sup> *Id.*, Appendix II. Sections 13 and 14 provide:

13(1) Subject to this Act, a person may, at any time, apply to a Judge or magistrate for an order restraining

(a) the transfer of any of the property of the debtor situated in the Northern Territory; or

(b) the removal of any of the property of the debtor out of the Northern Territory . . .

14(1) Upon an application made under section 13, a Judge or magistrate may make such order as he sees fit.

(2) A magistrate or Judge shall not make an order under sub-section (1) unless he is satisfied, that there are reasonable grounds for believing that—

The recent pace of legal developments in Ontario respecting *Mareva* injunctions cries out for attention from those bodies now reviewing the *Report of the Civil Procedure Revision Committee*. The new *Judicature Act* and proposed Rules of Civil Procedure will be seriously defective if this aspect of the law of prejudgment relief is not addressed. No recommendation for the codification of the courts' *Mareva* injunction jurisdiction, however, would be appropriate without an undertaking to rationalize all of the existing and proposed prejudgment remedies.

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- (a) the debtor owes a debt to the applicant;
  - (b) the debtor has an interest in property situated in the Territory;
  - (c) the property in which the debtor has an interest is about to be—
    - (i) transferred; or
    - (ii) removed from the Territory;
  - (d) failure to make the order would defeat, endanger or materially prejudice the applicant's prospects of recovering the debt; and
  - (e) the debt—
    - (i) is for wages due by the debtor to the applicant; or
    - (ii) is for an amount not less than the prescribed amount.